have been raised in a timely vacatur petition but was not) is waived.'' Oehmke, *supra*, §§ 133:5-6.[4] But when the 90-day period has not run, the district court ''must review the arbitration documents to determine the propriety of issuing an order of confirmation.'' Susan Wiens and Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery Out of a Summary Proceeding*, 33 Wm. Mitchell L. Rev. 1293, 1306 (2007). In this case, much as in *Graber v. Comstock Bank*, the district court erred in not reviewing the arbitration record and award before confirming it. 111 Nev. 1421, 1428-29, 905 P.2d 1112, 1116 (1995). Despite the limited judicial review available in arbitration cases, the district court nonetheless ''had the authority and obligation'' to review the award before rubber-stamping it. *Id*.

Accordingly, we reverse and remand with instructions to allow Casey an opportunity to be heard in opposition to the motion to confirm and on her motion to vacate, modify, or correct and for the district court to review the arbitration award consistent with this opinion.

SAITTA and HARDESTY, JJ., concur.

TODD BUTWINICK, AN INDIVIDUAL; AND NEVADA FURNITURE INCORPORATED, A NEVADA CORPORATION, APPELLANTS, *v*. CHARLES HEPNER, AN INDIVIDUAL; TRACY HEPNER, AN INDIVIDUAL; AND NEVADA FURNITURE IDEA, INC., A NEVADA CORPORATION, RESPONDENTS.

No. 56303

December 27, 2012 291 P.3d 119

Motion to substitute in as real parties in interest and to dismiss proper person appeal from a district court judgment in a contract and tort action.

Judgment creditors moved to substitute themselves as the real parties in interest in judgment debtor's appeal of underlying action

---

[4]The rule of waiver applies when the statutorily allotted time to move to vacate, modify, or correct an award has run. *Compare Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) (''Under the [Federal Arbitration] Act, if you fail to [timely] move to vacate an arbitration award you forfeit the right to oppose confirmation (enforcement) of the award if sought later by the other party.''), *with* Oehmke, *supra* § 133:5 (''Some courts have suggested that a *non-statutory* basis for vacatur (e.g., manifest disregard of the law, violation of public policy, due process, laches, violation of fundamental due process, and the like) may be articulated even after the three-month limitations period (to modify, correct or vacate) has expired.'').

after creditors acquired debtor's rights and interests in the underlying district court action at a judgment execution sale. The supreme court held that judgment creditors were precluded from substituting themselves as real parties in interest in appeal after acquiring judgment debtor's rights in underlying action.

Motion denied.

Nevada Furniture Incorporated, Las Vegas, in Proper Person.

Todd Butwinick, Las Vegas, in Proper Person.

Marquis Aurbach Coffing and *Frank M. Flansburg III* and *Jason M. Gerber*, Las Vegas, for Respondents.

APPEAL AND ERROR.

Although judgment execution statutes permitted a judgment creditor to execute on a debtor's personal property, including the right to bring an action to recover a debt, money, or thing, those statutes did not include the right to execute on a party's defenses to an action, and thus, judgment creditors, who acquired debtor's rights and interests in the underlying district court action at a judgment execution sale, were precluded from substituting themselves in debtor's appeal as real parties in interest and dismiss the appeal since such action would foreclose debtor's defenses to creditor's own claims. NRS 10.045, 21.080.

Before CHERRY, C.J., DOUGLAS, SAITTA, GIBBONS, PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

Per Curiam:

This case comes before the court on respondents' motion to substitute themselves as real parties in interest and to dismiss the appeal. Respondents acquired appellants' rights and interests in the underlying district court action at a judgment execution sale. Appellants oppose the motion. In moving to substitute in as real parties in interest and dismiss the appeal, respondents seek to foreclose appellants' defenses to respondents' own claims, which were successfully litigated in the district court, and the decision on those claims timely appealed. Although Nevada's judgment execution statutes permit a judgment creditor to execute on a debtor's personal property, including the right to bring an action to recover a debt, money, or thing, those statutes do not include the right to execute on a party's defenses to an action, and permitting a judgment creditor to execute on a judgment in such a way would cut off a debtor's defenses in a manner inconsistent with due process principles. Thus, we deny respondents' motion.

FACTS AND PROCEDURAL HISTORY

Underlying breach of contract action

Respondents Charles Hepner, Tracy Hepner, and Nevada Furniture Idea, Inc., brought the underlying action against appellants Todd Butwinick and Nevada Furniture, alleging breach of contract and fraud- and tort-based claims related to an asset purchase and sale agreement, under which respondents purchased two furniture stores from appellants. Appellants answered and filed a counterclaim, arguing that respondents failed to make payments on the promissory note used for the owner-financed purchase of the stores, and seeking to foreclose on the promissory note, which was secured by respondents' real property located in Tennessee.[1] Appellants also alleged defamation, unjust enrichment, and bad faith, and they sought damages as well as injunctive and declaratory relief. Following a bench trial, the district court entered judgment for respondents. It held that appellants misrepresented information about the furniture stores, materially breached the asset purchase sale agreement, and fraudulently induced respondents into executing the agreement. In its judgment, the district court allowed respondents to rescind the agreement, awarded them $735,835.84 in damages, and denied any relief to appellants on their counterclaims. This appeal followed.

Writ of execution and motions seeking to stay execution

Although they appealed the judgment, appellants did not obtain a stay of execution. Thus, despite the pending appeal, respondents obtained a writ of execution on the judgment, allowing them to execute against appellant Todd Butwinick's personal property. The writ directed the Clark County Sheriff to ''levy and seize upon any and all causes of action, claims, allegations, assertions and/or defenses of Todd Butwinick,'' including the underlying district court action. Appellants unsuccessfully attempted to restrain the sale and quash the writ of execution.

Motion to substitute as real parties in interest and dismiss appeal

At the sheriff's sale, respondents purchased, for $5,000, appellants' rights and interests in the district court action. Respondents now move to substitute as real parties in interest under NRAP 43 and to dismiss the appeal under NRAP 42(b), on the basis that they acquired appellants' claims and defenses at the sheriff's sale. Respondents assert that appellants received adequate notice of the sale and could have either obtained a stay of execution against their

---

[1]Butwinick has filed and recorded a notice of lis pendens against the property.

assets by posting a supersedeas bond or bid at the sheriff's sale.[2] Respondents argue that NRS 10.045 (defining personal property) and NRS 21.080(1) (describing property liable to execution) allow them to execute against appellants' counterclaims and defenses as personal property and no exemption from execution applies.

In opposition, appellants argue that unless the motion is denied, their right to appeal will be eliminated and the judgment will remain permanently unreviewed. They continue that granting the motion would damage the integrity of the appellate process because any party who ends up as a judgment debtor would lose his or her right to appeal unless he or she has the resources to post a bond. Finally, they note that respondents have provided no authority to establish that appellants' defenses to any underlying lawsuit are personal property subject to execution during the pendency of an appeal.

DISCUSSION

Under NRS 10.045, '' '[p]ersonal property' includes . . . things in action,'' and NRS 21.010 provides that ''the party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ of execution for its enforcement.'' In *Gallegos v. Malco Enterprises of Nevada*, 127 Nev. 579, 255 P.3d 1287 (2011), this court determined that ''rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment.'' *Id.* at 582, 255 P.3d at 1289. That decision explained that statutes specifying the kinds of property subject to execution must be construed liberally for the judgment creditor's benefit. *Id.*

Respondents base their motion to substitute and dismiss on their purchase of appellants' claims and defenses at the sheriff's sale. As appellants note, respondents have cited no authority to support the proposition that appellants' *defenses* to respondents' underlying lawsuit constitute a ''thing in action'' subject to execution under NRS 21.080 and NRS 10.045. Appellants did not bring the action on which respondents recovered judgment; appellants were the defendants, who lost. Thus, they did not bring an action to recover a debt, money, or things, but were defending against appellants' claims that the furniture stores were sold as a result of misrepresentations and fraud. Thus, this case differs from those relied on by respondents, where the acquired cause of action was that of the underlying plaintiff, who lost in the trial court. *See RMA Ventures California v. SunAmerica Life Ins.*, 576 F.3d 1070 (10th Cir. 2009) (interpreting Utah law, to permit a defendant to execute

[2]According to appellants, Butwinick's financial situation made bidding at the sheriff's sale or posting a bond impossible.

against the plaintiff's claims for breach of contract and fraud, which were disposed of on summary judgment in the district court and pending appeal, in satisfaction of an attorney fees award that was not appealed); *Applied Medical Technologies, Inc. v. Eames*, 44 P.3d 699 (Utah 2002) (granting a defendant judgment creditor's motion to dismiss an appeal, after the defendant purchased at a constable's sale claims asserted against him by the plaintiff judgment debtor). Respondents have offered no authority, nor have we found any, to support the proposition that a litigant's defenses are assignable. *Cf. Achrem v. Expressway Plaza Ltd.*, 112 Nev. 737, 917 P.2d 447 (1996) (explaining that the rights to a tort action are not assignable); *Maxwell v. Allstate Ins. Co.*, 102 Nev. 502, 728 P.2d 812 (1986) (same); *Prosky v. Clark*, 32 Nev. 441, 109 P. 793 (1910) (explaining that rights of action based on fraud are not assignable, but are personal to the one defrauded).

In this case, respondents executed not only on appellants' ''claims,'' but also on their ''defenses'' in the underlying district court action. On appeal, as argued in appellants' opening brief,[3] appellants are not challenging the district court's judgment to the extent that it denied or dismissed their counterclaim. Instead, the appeal focuses on respondents' claims (and thus appellants' defenses) and alleged errors in the district court's judgment granting rescission and awarding damages and attorney fees to respondents.[4] In moving to substitute in as real parties in interest and dismiss the appeal, respondents seek to preclude appellants' defenses to respondents' own claims, but ''thing in action'' does not include defenses, *see Gallegos*, 127 Nev. at 582, 255 P.3d at 1289 (defining ''thing in action'' as a '' 'right to bring an action to recover a debt, money, or thing' '' (quoting *Black's Law Dictionary* 275 (9th ed. 2009))). Since appellants have waived any challenge to the denial or dismissal of their counterclaims, either because they stipulated to the dismissal in the district court or because they did not raise any arguments related to those counterclaims in their opening brief on appeal, respondents' motion to substitute and to dismiss is not proper under NRS 21.080, as granting the motion would serve only to foreclose appellants' defenses to respondents' underlying claims and their challenge to the resultant district court judgment.

---

[3]Appellants' counsel was permitted to withdraw after the opening brief and opposition to the motion to dismiss were filed. Appellant Todd Butwinick has since notified this court that he will be proceeding in proper person, which notice we direct the clerk to file.

[4]The last issue raised in the opening brief does not directly challenge the district court's dismissal of appellants' foreclosure counterclaim based on jurisdiction grounds. Instead, appellants argue that the district court made inconsistent findings that could have a preclusive effect if appellants ever pursue foreclosure on the Tennessee property in Tennessee courts.

See In re Morales, 403 B.R. 629, 632-33 (Bankr. N.D. Iowa 2009) (determining in a bankruptcy action that, under Iowa law, a debtor's defensive appellate rights arising from a judgment against the debtor did not constitute a chose in action that could be purchased by the creditor, so that the creditor could dismiss the appeal, and disagreeing with *In re Mozer*, 302 B.R. 892 (Bankr. C.D. Cal. 2003), in which the bankruptcy court concluded that the debtors' rights to defend against a judgment on the buyers' counterclaim were assets of the bankruptcy estates). Nevada's judgment execution statutes do not contemplate executing on defensive appellate rights as property, and therefore we deny respondents' motion. *See* NRS 21.080; NRS 10.045; *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289.

CONCLUSION

Because a ''thing in action'' subject to execution under NRS 21.080 and NRS 10.045 does not include a party's defenses to an action, and allowing a creditor to execute against a debtor's defenses as personal property would cut off the debtor's defensive appellate rights, we deny respondents' motion to substitute and to dismiss the appeal, and we reinstate the briefing schedule to allow respondents to file an answering brief. Respondents shall have 45 days from the date of this opinion to file and serve the answering brief. Once the answering brief is filed and served, this matter will be submitted for a decision on the merits.

BEAZER HOMES HOLDING CORP., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, RESPONDENTS, AND VIEW OF BLACK MOUNTAIN HOMEOWNERS' ASSOCIATION, INC., REAL PARTY IN INTEREST.

No. 57187

December 27, 2012 291 P.3d 128

Original petition for a writ of mandamus or prohibition challenging a district court order determining that, under NRS 116.3102(1)(d), a homeowners' association could litigate, on behalf of its members, construction-defect claims with respect to its members' homes without meeting NRCP 23's class action prerequisites.

Developer petitioned for a writ of mandamus or prohibition challenging a district court order determining that homeowners' association could litigate, on behalf of its members, construction-defect claims with respect to its members' homes without meeting class action prerequisites. The supreme court, DOUGLAS, J., held that district court was required to determine if action by association against developer for construction defects, breach of implied and express warranties, and negligence met all class action requirements.

Petition granted in part.

Koeller Nebeker Carlson & Haluck, LLP, and *Robert C. Carlson* and *Megan K. Dorsey*, Las Vegas, for Petitioner.

Feinberg Grant Mayfield Kaneda & Litt, LLP, and *Bruce G. Mayfield, Daniel H. Clifford*, and *Charles M. Litt*, Las Vegas, for Real Party in Interest.

Thomas & Springberg, P.C., and *Andrew J. Thomas*, Las Vegas, for Amicus Curiae Nevada Justice Association.

1. APPEAL AND ERROR.
   In appropriate circumstances, the supreme court will review constitutional issues and arguments not raised below.
2. MANDAMUS; PROHIBITION.
   Writs of mandamus and prohibition are extraordinary remedies; whether a petition for extraordinary relief will be considered is solely within the supreme court's discretion. NRS 34.160, 34.320.
3. MANDAMUS; PROHIBITION.
   The burden is on the petitioner for extraordinary relief of writs of mandamus or prohibition to demonstrate that extraordinary relief is warranted. NRS 34.160, 34.320.
4. MANDAMUS; PROHIBITION.
   The ability to challenge an issue in the context of an appeal from a future judgment is generally an adequate and speedy legal remedy such that writ relief is precluded; however, the supreme court determines in each particular case whether a future appeal is sufficiently adequate and speedy by considering a number of factors, including the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit the court to meaningfully review the issues presented. NRS 34.160, 34.320.
5. MANDAMUS; PROHIBITION.
   The supreme court would exercise its discretion to consider developer's petition for a writ of mandamus or prohibition challenging a district court order determining that homeowners' association could litigate, on behalf of its members, construction-defect claims with respect to its members' homes without meeting class action prerequisites, since petition raised important issues of law and public policy, a significant number of similar cases raising these issues were pending throughout Nevada's courts, and neither judicial economy nor the parties' interests would have been served by awaiting a future appeal.

6. APPEAL AND ERROR.
   The supreme court reviews legal questions de novo.
7. PARTIES.
   An action must be commenced by the one who possesses the right to enforce the claim and has a significant interest in the litigation. NRCP 17(a).
8. ACTION.
   A party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court. NRCP 17(a).
9. COMMON INTEREST COMMUNITIES.
   In the absence of any express statutory grant to bring suit on behalf of owners, or a direct ownership interest by the association in a condominium within the development, a condominium management association does not have standing to sue; similarly, without statutory authorization, a homeowners' association does not have standing to bring suit on behalf of its members. NRCP 17(a).
10. COMMON INTEREST COMMUNITIES.
    Statute that allows community association to, not only come into court, but also obtain relief solely on behalf of its members, if it is acting on behalf of two or more unit owners, affords the common-interest community association the right to obtain relief solely on behalf of its members. NRS 116.3102(1)(d).
11. COMMON INTEREST COMMUNITIES.
    Failure by common-interest community association to meet procedural requirements additional to requirement that it is acting on behalf of two or more unit owners, including class action requirements, cannot strip association of its standing to proceed on behalf of its members under statute that allows it to obtain relief solely on behalf of its members, if it is acting on behalf of two or more unit owners; however, such failure may influence how the case proceeds. NRS 116.3102(1)(d); NRCP 23.
12. COMMON INTEREST COMMUNITIES.
    Common-interest community associations can bring suit, not only to recover damages pertaining to common areas and areas over which they are responsible for maintenance and repair, but also on a purely representative basis. NRS 116.3102(1)(d).
13. COMMON INTEREST COMMUNITIES; PARTIES.
    In analyzing class action factors in action by common-interest community association on behalf of members, the district courts are not determining whether the action can proceed; rather, they are determining how the action should proceed, *i.e.*, whether it is treated like a class action, a joinder action, consolidated actions, or in some other manner. NRS 116.3102(1)(d); NRCP 23.
14. PARTIES.
    In examining the numerosity requirement, which questions whether the members of a proposed class are so numerous that separate joinder of each member is impracticable, in action by common-interest community association on behalf of members, the court need only determine that the association's claim pertains to at least two units' owners; if so, the representative action is permissible and cannot be defeated on the ground that the represented members are insufficiently numerous. NRS 116.3102(1)(d); NRCP 23.
15. PARTIES.
    Individualized claims for monetary relief are subject to rule of civil procedure requiring class action plaintiff to prove that questions of law or

fact predominate over any questions affecting only individual members and that a class action is the superior method of adjudicating the case. NRCP 23(b)(3).

16. PARTIES.

The commonality requirement, which examines the factual and legal similarities between claims and defenses, and the predominance requirement, which questions whether common questions predominate over individualized questions, will affect whether the member ''class'' is divided into subclasses and, if so, how, in action by common-interest community association on behalf of members; the requirements also affect the resolution of generalized proof and other evidentiary questions and influence how trial will proceed. NRS 116.3102(1)(d); NRCP 23(b)(3).

17. JUDGMENT; PARTIES.

Reviewing any concerns with typicality and adequacy requirements, which seek to ensure that class members are fairly and adequately represented by common-interest community association in action on behalf of members, will affect issues regarding notice to association members and influence how claim preclusion issues should be addressed. NRS 116.3102(1)(d); NRCP 23.

18. PARTIES.

A common-interest community association is typically the embodiment of a community of interest such that the typicality of the claims pertaining to at least two of the units will generally meet the adequacy requirement for class actions in action by association on behalf of members; but, issues regarding the overall adequacy of representation must be determined by the district court. NRS 116.3102(1)(d); NRCP 23.

19. PARTIES.

Upon a motion for action by common-interest community association on behalf of members to proceed as a class action, the district court must thoroughly analyze class action rule's requirements and document its findings. NRCP 23.

20. PARTIES.

The district courts are vested with ample authority to decide to what extent, if any, ordinary class action requirements should be modified to suit action by common-interest community association on behalf of members. NRCP 23.

21. COMMON INTEREST COMMUNITIES; PARTIES.

If action by common-interest community association on behalf of members meets all of class action rule's requirements, it may then proceed with the litigation in a class action format; if not, the district court must determine an alternative for the action to proceed such as a joinder action, consolidated action, or in some other manner. NRS 116.3102(1)(d); NRCP 23.

22. COMMON INTEREST COMMUNITIES.

In determining an alternative to class action for action by common-interest community association on behalf of members, as required when the action does not meet all of the class action rule's requirements, the district court must analyze and document its findings to show that the alternative method to proceed will adequately identify factual and legal similarities between claims and defenses, provide notice to members represented by the association, and confront how claim preclusion issues will be addressed; court can then fashion an appropriate alternative case management plan to efficiently and effectively resolve the case, retain control over the action, and have flexibility to make appropriate orders. NRS 116.3102(1)(d); NRCP 23.

23. PARTIES.

The district court was required to determine if action by common-interest community association against developer for construction defects, breach of implied and express warranties, and negligence met all class action requirements; analyzing class action factors when requested to do so was necessary to help guide the court and the parties in developing a meaningful and efficient case management plan. NRS 116.3102(1)(d); NRCP 23.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

This writ petition arises from construction-defect litigation between a homeowners' association and a developer. In it, the developer challenges the district court's decision to allow the association to proceed in a purely representative capacity without strictly meeting NRCP 23's class action requirements, as set forth in *D.R. Horton v. District Court* (*First Light II*), 125 Nev. 449, 215 P.3d 697 (2009). We clarify that, while purely representative actions brought by homeowners' associations are not necessarily precluded by failure to meet NRCP 23's class action prerequisites, the district court is required, if requested by the parties, to thoroughly analyze and document its findings to support alternatives to class action for the case to proceed, such as joinder, consolidation, or some other manner. In doing so, the district court must determine, among other issues, which units represented by the association have constructional defects, that the alternative method to proceed will adequately identify factual and legal similarities between claims and defenses, provide notice to members represented by the association, and confront how claim preclusion issues will be addressed. Accordingly, we grant the petition in part so that the district court in this case can conduct the appropriate analysis.

FACTS AND PROCEDURAL HISTORY

The developer, petitioner Beazer Homes Holding Corp., helped construct a planned development known as The View of Black Mountain Community in Henderson, Nevada. The View of Black Mountain Community consists of 131 duplex units; the two homes in each unit share a single interior wall, as well as common exterior walls and a common roof and foundation. The homes are separated by an imaginary vertical plane at the center of the building, and the homeowners are individually responsible for maintenance and repair of each home. The Community is governed by real party in interest View of Black Mountain Homeowners' Association,

Inc., a common-interest community association created pursuant to NRS Chapter 116.

Although Black Mountain HOA is expressly excluded from any maintenance or repair obligation pertaining to the individual units, it sued the developers, sellers, and builders of the development, including Beazer Homes, on behalf of the individual homeowners, alleging construction-defect-based claims for breach of implied and express warranties and negligence. Thereafter, Black Mountain HOA filed a motion for the district court to determine that its claims satisfied the class action requirements of NRCP 23, in accordance with this court's decision in *First Light II*, which concluded that homeowners' associations had standing to sue on behalf of their members and indicated that they could proceed if they met class action requirements. 125 Nev. at 458, 215 P.3d at 703. Black Mountain HOA asserted that it met NRCP 23's requirements because it was seeking to remedy defective construction solely of the homes' shared elements—the buildings' exterior walls, windows, doors, and roofs, which it termed ''the building envelope.'' It argued that, despite the units' individual ownership, its suit was no different from the leaking condominium roof claims that were allowed to proceed as a class action in *Deal v. 999 Lakeshore Association*, 94 Nev. 301, 579 P.2d 775 (1978).

Beazer Homes opposed the motion, arguing that Black Mountain HOA failed to meet its burden because it did not identify specific information concerning the alleged defects, such as the defects' possible locations, the number of homes allegedly affected, what caused the alleged defective conditions, the resulting damages, and the requested repairs. Beazer Homes also asserted that no single ''building envelope'' defect was at issue; rather, there were multiple, distinct defects. It also pointed out that the community was constructed by different owners, developers, and contractors, which implicated different defenses.

After a hearing, the district court concluded that this case was factually distinguishable from *First Light II* because it involved exterior, not interior, defects. Noting that homeowners' associations are expressly permitted to litigate on behalf of their members under NRS 116.3102(1)(d), the district court concluded that Black Mountain HOA did not need to satisfy the requirements of NRCP 23 and thus allowed the action to proceed without conducting a class action analysis.

Beazer Homes now petitions this court for a writ of mandamus or prohibition, claiming that the district court acted arbitrarily and capriciously by refusing to undertake a class action analysis. In its writ petition, Beazer Homes argues that our decision in *First Light II* requires a homeowners' association to meet NRCP 23's re-

quirements before it may pursue its homeowners' construction-defect claims in a representative capacity. Beazer Homes asks us to direct the district court to analyze the NRCP 23 factors (numerosity, commonality, typicality, and adequacy under NRCP 23(a) and predominance and superiority under NRCP 23(b)(3)) and, based on the outcome of that analysis, to then deny Black Mountain HOA's motion to proceed with its representative claims.

[Headnote 1]

In response, Black Mountain HOA argues that Beazer Homes' interpretation of *First Light II*—requiring common-interest community associations to strictly meet NRCP 23 requirements—unconstitutionally abridges its right to proceed in a representative capacity under NRS 116.3102(1)(d). Instead, Black Mountain HOA insists that the district court properly harmonized NRCP 23 with NRS 116.3102(1)(d) and allowed the action to proceed.[1]

We grant Beazer Homes' petition for writ relief to the extent that we direct the district court to analyze the NRCP 23 factors in this case. In so doing, we take this opportunity to clarify the application of *First Light II* when a homeowners' association seeks to litigate construction-defect claims on behalf of its members under NRS 116.3102(1)(d).

DISCUSSION

[Headnotes 2, 3]

A writ of mandamus may be issued to compel action that the law requires as a duty resulting from an office, trust, or station, or to remedy an arbitrary or capricious exercise of discretion. NRS 34.160; *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). ''Prohibition is a proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction.'' *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see* NRS 34.320. Writs of mandamus and prohibition are extraordinary remedies, and whether a petition for extraordinary relief will be considered is solely within this court's discretion. *See Smith*, 107 Nev. at 677, 818 P.2d at 851. The burden is on the petitioner to demonstrate that extraordinary relief is warranted. *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

---

[1]In appropriate circumstances, we will review constitutional issues and arguments not raised below. *Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 643-44, 600 P.2d 1189, 1190-91 (1979). However, because we conclude that the parties improperly interpret *First Light II* as necessarily disallowing association-led representative construction-defect actions that do not strictly meet NRCP 23's requirements, we need not reach Black Mountain HOA's constitutional arguments.

[Headnote 4]

We have recognized that ''a writ will not issue if the petitioner has a plain, speedy and adequate remedy at law.'' *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250-51, 148 P.3d 694, 698 (2006); *see* NRS 34.170; NRS 34.330. The ability to challenge an issue in the context of an appeal from a future judgment is generally an adequate and speedy legal remedy such that writ relief is precluded. *D.R. Horton v. Dist. Ct.*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007). However, we determine in each particular case whether a future appeal is sufficiently adequate and speedy by considering a number of factors, including ''the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.'' *Id.* at 474-75, 168 P.3d at 736.

[Headnote 5]

In this instance, Beazer Homes lacks a plain, speedy, and adequate remedy at law. Beazer Homes' petition raises important issues of law and public policy concerning the ability of common-interest community associations to litigate claims on behalf of their members in a representative capacity. A significant number of similar cases raising these issues are pending throughout Nevada's courts. Since the district court proceedings are merely in the preliminary stages, neither judicial economy nor the parties' interests would be served by awaiting a future appeal. Our consideration of the issues raised in this petition will affect not only the remainder of the substantial litigation below, but also the many other cases pending before both this court and district courts throughout the state. Therefore, we conclude that our consideration of Beazer Homes' writ petition will promote judicial economy, and we elect to exercise our discretion to do so. *Williams v. Dist. Ct.*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011).

[Headnote 6]

The parties' primary arguments raise legal questions, which we review de novo. *International Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. Both parties agree that Black Mountain HOA must meet the NRCP 23 requirements to proceed with the representative action, but they differ as to what is sufficient to meet those requirements.

Representative actions under NRS 116.3102(1)(d) and NRCP 23

[Headnotes 7-9]

Under Nevada law, an action must be commenced by the real party in interest—''one who possesses the right to enforce the claim and has a significant interest in the litigation.'' *Szilagyi v.*

Testa, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983); *see* NRCP 17(a). Due to this limitation, a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court. *See Deal*, 94 Nev. at 304, 579 P.2d at 777; *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975). Therefore, we have recognized that, ''[i]n the absence of any express statutory grant to bring suit on behalf of the owners, or a direct ownership interest by the association in a condominium within the development, a condominium management association does not have standing to sue as a real party in interest.'' *Deal*, 94 Nev. at 304, 579 P.2d at 777. Similarly, without statutory authorization, a homeowners' association does not have standing to bring suit on behalf of its members. *See First Light II*, 125 Nev. at 455, 215 P.3d at 701.

In 1991, however, the Nevada Legislature adopted the Uniform Common-Interest Ownership Act. *See* NRS 116.001-.795. This legislation conferred standing on common-interest community associations—including condominium associations and homeowners' associations—to litigate certain matters in their own name on behalf of their members. NRS 116.3102(1) currently provides:

> Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:
>
> . . . .
>
> (d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.[2]
>
> . . . .

[Headnotes 10, 11]

Accordingly, so long as a common-interest community association is acting on behalf of two or more units' owners, it can represent its members in actions concerning the community. This statute affords the common-interest community association not only the right to come into court, but also the right to obtain relief solely on behalf of its members. *See Friendly Village Com. Ass'n, Inc. v. Silva & Hill Const. Co.*, 107 Cal. Rptr. 123, 125 (Ct. App. 1973) (explaining the difference between capacity to sue and standing concepts). Failure to meet any additional procedural requirements, including NRCP 23's class action requirements, cannot strip a common-interest community association of its standing to proceed on behalf of its members under NRS 116.3102(1)(d). *State v. Connery*, 99 Nev. 343, 345, 661 P.2d 1298, 1300 (1983)

---

[2]Minor changes to NRS 116.3102(1)(d) have been made since 1991, but as they do not alter the substance of the provision, they are not recited here.

(recognizing that procedural rules promulgated under the court's inherent powers may not ''abridge, enlarge or modify'' substantive rights (quoting NRS 2.120(2))). However, such failure may influence how the case proceeds.

[Headnote 12]

We examined NRS 116.3102(1)(d) in *First Light II* and concluded, consistent with our analysis above, that the plain meaning of that provision confers standing on common-interest community associations to assert their members' claims regarding matters concerning the common-interest community, including claims that affect individual units. *First Light II*, 125 Nev. at 457, 215 P.3d at 702-03 (citing NRS 116.3102(1)(d)). Accordingly, common-interest community associations can bring suit not only to recover damages pertaining to common areas and areas over which they are responsible for maintenance and repair, but also on a purely representative basis.

In concluding that NRS 116.3102(1)(d) permits such a representative action, however, we also recognized that when the common-interest community association is pursuing the individual construction-defect claims of multiple unit owners, the actions ''are amenable to the same treatment as class action lawsuits brought by individual homeowners.'' *First Light II*, 125 Nev. at 459, 215 P.3d at 704. In so recognizing, we held that the district court must conduct a thorough NRCP 23 analysis, *id.*, to determine whether plaintiffs can maintain a class action. Our holding was largely based on practical difficulties in managing sizeable construction-defect cases, on concerns with the use of generalized proof to determine liability and compensation in such cases, and on our acknowledgment in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005), that due to land's unique nature, '' 'as a practical matter, single-family residence constructional defect cases will rarely be appropriate for class action treatment.' '' *First Light II*, 125 Nev. at 458, 215 P.3d at 703 (quoting *Shuette*, 121 Nev. at 854, 124 P.3d at 542); *see also Shuette*, 121 Nev. at 856, 124 P.3d at 543 (explaining the difficulties inherent in pursuing most construction-defect claims as a class action).

Other authorities have also acknowledged the similarities between these types of representative actions and class actions. For instance, the commentary to the Restatement (Third) of Property, section 6.11, which mirrors section 3-102 of the Uniform Common Interest Ownership Act, upon which NRS 116.3102 is based, likened the two types of actions, stating ''[i]n suits where no common property is involved, the association functions much like the plaintiff in class-action litigation, and questions about the rights and duties between the association and the members with respect

to the suit will normally be determined by the principles used in class-action litigation.''[3] Restatement (Third) of Prop.: Servitudes § 6.11 cmt. a (2000), *quoted with approval in First Light II*, 125 Nev. at 458, 215 P.3d at 703. Similarly, in a California Court of Appeal case involving a homeowners' association-led representative action, that court ''look[ed] to the essential nature of the . . . action and [found] it to be a class action on behalf of a self-defined class.'' *Salton City Etc. v. M. Penn Phillips Co.*, 141 Cal. Rptr. 895, 898 (Ct. App. 1977).

Thus, typically, when common-interest community associations bring construction-defect claims on behalf of their members, they will seek to proceed as if the lawsuit were a class action, and evaluating class action requirements and protections will be necessary. Accordingly, in *First Light II*, we stated that when a common-interest community association brings a construction-defect suit on behalf of its members, ''a developer may, under *Shuette*, challenge whether the associations' claims are subject to class certification,'' 125 Nev. at 459, 215 P.3d at 704, and we directed the district court to analyze whether the claims asserted in the case ''conform[ed] with class action principles.'' *Id.* at 460, 215 P.3d at 705. Black Mountain HOA argues that our language here and in other parts of the *First Light II* decision has caused some confusion, leading to the diverse positions taken by the district court and the parties in this case. We now clarify that, notwithstanding any suggestions in *First Light II* to the contrary, failure of a common-interest community association to strictly satisfy the NRCP 23 factors does not automatically result in a failure of the representative action.

[Headnote 13]

Nevertheless, analyzing the factors when requested to do so is necessary for a variety of reasons, and the analysis will help guide both the court and the parties in developing a meaningful and efficient case management plan. In analyzing the factors, district courts are not determining whether the action can proceed; rather, they are determining how the action should proceed, *i.e.*, whether it is treated like a class action, a joinder action, consolidated actions, or in some other manner.

[Headnote 14]

Thus, for example, in examining the numerosity requirement, which questions whether ''the members of a proposed class [are] so numerous that separate joinder of each member is impractica-

---

[3]Rights and duties between an association and its members implicate, among other things, NRCP 23(c)(2) (notice and opt-out procedures), NRCP 23(c)(3) (class members included in the judgment), and NRCP 23(e) (governing dismissal and compromise).

ble,'' *Shuette*, 121 Nev. at 846, 124 P.3d at 537, the court need only determine that the common-interest community association's representative action claim pertains to at least two units' owners; if so, the representative action is permissible and cannot be defeated on the ground that the represented members are insufficiently numerous. *See* NRS 116.3102(1)(d). Nevertheless, evaluating the number of individual homeowners' units involved can help determine whether the case will proceed more like a class action, joinder action, or in some other fashion and how discovery, recovery, and claim preclusion issues should be addressed. *Cf. Salton City*, 141 Cal. Rptr. at 899 (noting that having a readily defined class, such as members of a homeowners' association, may have significant advantages over the typical broad class in other types of class actions).

[Headnotes 15, 16]

The commonality requirement, which examines the factual and legal similarities between claims and defenses, *Shuette*, 121 Nev. at 846, 124 P.3d at 537, and the NRCP 23(b)(3) predominance requirement, which questions whether common questions predominate over individualized questions,[4] will affect whether the member ''class'' is divided into subclasses and, if so, how. They also affect the resolution of generalized proof and other evidentiary questions and influence how trial will proceed. In *First Light II*, we noted that ''the district court may classify and distinguish claims that are suitable for class action certification from those requiring individualized proof.'' 125 Nev. at 459, 215 P.3d at 704. By evaluating the commonality and predominance requirements, the court can best organize the proceedings for the particular circumstances of the case.

[Headnotes 17, 18]

Reviewing any concerns with typicality and adequacy, which seek to ensure that the class members are fairly and adequately represented by the plaintiffs, will affect issues regarding notice to the association members and influence how claim preclusion issues should be addressed. *See Salton City*, 141 Cal. Rptr. at 899. As the California court noted, a common-interest community association ''is typically the embodiment of a community of interest.'' *Id.* Although the typicality of the claims pertaining to at least two of the units will generally meet the adequacy requirement, issues

---

[4]Under NRCP 23(b)(3), the class action plaintiff must prove ''that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is [the] superior [method of adjudicating the case].'' Individualized claims for monetary relief are subject to this subsection. *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 388 (2011) (discussing the analogous federal rule).

regarding the overall adequacy of representation must be determined by the district court. *Salton City*, 141 Cal. Rptr. at 899-900 (recognizing that, depending on the attendant circumstances, members' authorization to bring suit may or may not provide adequate notice to the ''class'').

[Headnotes 19-22]

Ultimately, upon a motion to proceed as a class action, the district court must ''thoroughly analyze NRCP 23's requirements and document its findings.'' *First Light II*, 125 Nev. at 459, 215 P.3d at 704. District courts are ''vested with ample authority to decide to what extent, if any, ordinary class action requirements should be modified to suit the case.'' *Salton City*, 141 Cal. Rptr. at 900. If the association meets all of NRCP 23's requirements, it may then proceed with the litigation in a class action format. If not, the district court must determine an alternative for the action to proceed such as a joinder action, consolidated action, or in some other manner. In doing so, the district court shall analyze and document its findings to show that the alternative method to proceed will adequately identify factual and legal similarities between claims and defenses, provide notice to members represented by the association, and confront how claim preclusion issues will be addressed. In this, the district court can then fashion an appropriate alternative case management plan to efficiently and effectively resolve the case. Regardless, the court retains control over the action and has flexibility to make appropriate orders. *See* NRCP 23(d).

The district court abused its discretion in granting Black Mountain HOA's motion for declaratory relief without analyzing the NRCP 23 requirements

[Headnote 23]

In this case, the district court concluded that Black Mountain HOA had standing under NRS 116.3102(1)(d) and therefore, did not have to demonstrate it met NRCP 23's requirements. As explained above, NRS 116.3102(1)(d) standing does not obviate the need to evaluate the NRCP 23 requirements. Rather, NRCP 23's requirements must be examined upon request, and if Black Mountain HOA wishes to litigate its members' claims as a class action, it must demonstrate that it meets those requirements or provide an alternative method for doing so that achieves the objectives embodied in NRCP 23.[5] Accordingly, the district court acted arbi-

[5]To develop a meaningful case management plan when addressing the NRCP 23 motion below, Black Mountain HOA must reveal the alleged construction defects in sufficient detail to support the claims asserted. Merely contending that all of the claims affect the ''building envelope'' addresses only part of the

trarily and capriciously by failing to conduct a full and proper analysis under NRCP 23.

CONCLUSION

Because the district court erred in failing to conduct an NRCP 23 analysis, we grant the writ petition in part and direct the clerk of this court to issue a writ of mandamus instructing the district court to conduct a proper NRCP 23 analysis, and we deny Beazer Homes' petition as it pertains to a writ of prohibition. We also decline Beazer Homes' request to direct the district court to deny Black Mountain HOA's motion. The district court is in the best position to analyze the facts and circumstances of this case and to determine the method by which the case can proceed.

CHERRY, C.J., and SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

SAMUEL HOWARD, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57469

December 27, 2012 291 P.3d 137

Motions in a capital post-conviction appeal related to sealing documents filed in this court.

Defendant filed a fourth post-conviction petition for a writ of habeas corpus, challenging his convictions for robbery with the use of a deadly weapon and first-degree murder and his sentence of death. The petition was denied, and defendant appealed. Defense counsel filed an ex parte motion to substitute counsel. The motion was filed under seal. The State opposed the substitution motion and moved to unseal it. Defendant filed a motion to seal the State's opposition. A justice of the supreme court denied the State's motion to unseal and granted defendant's motion to seal the opposition. The State filed a motion for reconsideration. Defendant filed a motion to seal the reconsideration motion and any pleadings related to the substitution of counsel. The State opposed the motion. Defendant filed a motion to strike the motion for reconsideration and to direct the State's conduct as to the various pleadings filed regarding the substitution motion. The State also opposed that

---

necessary analysis and is inadequate, based on the discussion above, to inform the court and the defendants of the nature of the claims in a way that would enable the litigation to proceed effectively.

motion. The supreme court, HARDESTY, J., held that defendant did not establish a justification for sealing of the pleadings related to the substitution motion.

Motion for reconsideration of order sealing documents granted; other motions denied.

Rene Vallardes, Federal Public Defender, and *Megan Hoffman* and *Lori C. Teicher*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

1. RECORDS.
   Although public access to judicial records and documents in a criminal case is favored, it is not unfettered.
2. RECORDS.
   American courts generally do not condition enforcement of the common-law right to inspect and copy public records on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.
3. COURTS; RECORDS.
   Every court has supervisory power over its own records and files, and the decision to allow access to court records is best left to the sound discretion of the court.
4. RECORDS.
   There exists a presumption in favor of public access to records and documents filed in the supreme court.
5. RECORDS.
   Under common law, to which Nevada assents, the supreme court retains supervisory power over its records and possesses inherent authority to deny public access when justified.
6. RECORDS.
   Presumption in favor of public access to records and documents filed with the supreme court may be abridged only where the public right of access is outweighed by a significant competing interest.
7. RECORDS.
   A party seeking to seal a record or document filed in the supreme court carries the burden of demonstrating sufficient grounds for denying access.
8. RECORDS.
   A party seeking to seal a document in a criminal case pending in the supreme court must file a written motion and serve the motion on all parties involved in the action; the motion must identify the document or information the party seeks to seal, must identify the grounds upon which sealing the subject documents is justified and specify the duration of the sealing order, and must explain why less restrictive means will not adequately protect the material.
9. RECORDS.
   Examples of court records in criminal proceedings that may be sealed in the supreme court include records containing privileged attorney-client communications where the privilege has not been waived, records con-

taining information that is permitted or required under federal or Nevada law to be sealed, and records containing information the sealing of which is justified or required by an identified significant competing interest. NRS 49.095.

10. RECORDS.

Defendant did not establish a justification for sealing of pleadings filed in the supreme court related to defense counsel's ex parte motion to substitute counsel on appeal from a denial of a fourth post-conviction petition for a writ of habeas corpus in a capital case; defendant initially did not file a separate motion seeking to seal the substitution motion but rather presumed that labeling it as sealed would make it sealed, and the pleadings did not, contrary to defendant's argument, disclose the contents of any privileged communication between defendant and his attorneys or any other confidential information but, at most, included general statements about the facts that created an alleged conflict of interest. NRS 49.095; RPC 1.6; NRAP 27(a)(1).

11. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.

Although a conflict of interest may touch upon the attorney-client relationship itself where the attorney is placed in a situation conducive to divided loyalties, the facts establishing the existence of a conflict of interest do not necessarily implicate the attorney-client privilege. NRS 49.095; RPC 1.7(a).

12. RECORDS.

Desire to avoid unnecessary embarrassment is, standing alone, insufficient to warrant sealing court records from public inspection.

Before SAITTA, PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

Several pending motions in this case provide us with the opportunity to address the procedures and requirements for sealing documents and records in criminal cases pending in this court. We hold that documents filed in this court are presumptively open to the public unless we exercise our inherent authority and grant a motion to file specific documents under seal based on a showing that such action is required by law or an identified significant competing interest. Thus, a party who seeks to have documents or records filed with this court under seal must file a motion that identifies the information that the party seeks to have sealed, sets forth the reasons that such action is necessary, and specifies the duration of the sealing order.

In this instance, we conclude that the documents that appellant's counsel sought to have sealed do not meet the requirements for sealing for two reasons. First, the manner in which appellant attempted to seal the documents initially was improper. Second, the information he sought to protect from public disclosure is not of the character appropriate for sealing. We therefore grant the

State's motion for reconsideration and deny appellant's competing motions.

PROCEDURAL HISTORY

Appellant Samuel Howard was convicted of two counts of robbery with the use of a deadly weapon and first-degree murder with the use of a deadly weapon and sentenced to death based on the robbery of a Sears department store security officer and the robbery and murder of a doctor in separate incidents in Las Vegas in March 1980. This appeal involves the denial of his fourth post-conviction petition for a writ of habeas corpus challenging his conviction and sentence.

Counsel for Howard filed an ex parte motion to substitute counsel.[1] The motion included a cover sheet indicating that it was filed under seal. Although counsel did not file a separate motion requesting leave to file the motion under seal, the substitution motion was nevertheless filed under seal. The State opposed the substitution motion and moved to unseal it. Howard responded by filing a motion to seal the State's opposition. A justice of this court denied the State's motion to unseal the substitution motion and granted Howard's motion to seal the opposition. *See* NRAP 27(c)(1) (providing that single justice may act alone on any motion). Subsequently, the State filed a motion for reconsideration of that order.[2] *See id.* (''The court may review the action of a single justice.''). Howard then filed a motion to seal the reconsideration motion and any pleadings related to the substitution of counsel, which the State opposed. Later, Howard filed a motion to strike the motion for reconsideration and to direct the State's conduct respecting the various pleadings filed regarding the substitution motion. The State opposed that motion, and Howard filed a reply. For the reasons explained below, we conclude that reconsideration of the prior order denying the State's motion to unseal the substitution motion and granting Howard's motion to seal the opposition to the substitution motion is warranted.

DISCUSSION

Based on an ''unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of

---

[1]This court has approved the substitution of counsel, and Howard is no longer represented by the Nevada Federal Public Defender's Office in this appeal.

[2]The State seeks the full court's consideration, but we are not convinced that en banc review of the action of a single justice on a procedural motion is appropriate or warranted under NRAP 27(c)(1).

a criminal trial under our system of justice.'' *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (commenting on historical openness of trials in England and America). Openness and transparency are the cornerstones of an effective, functioning judicial system. *Id.* at 569, 571-72 (observing that historical English jurists recognized importance of open trials to thwart ''perjury, the misconduct of participants, and decisions based on secret bias or partiality'' and that ''[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice' '' (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))). Safeguarding those cornerstones requires public access not only to judicial proceedings but also to an equally important aspect of the judicial process—judicial records and documents. *See Roman Cath. Diocese of Lexington v. Noble*, 92 S.W.3d 724, 732 (Ky. 2002) (observing that access to judicial records and documents ''cast[ ] the disinfectant of sunshine brightly on the courts, and thereby acts as a check on arbitrary judicial behavior and diminishes the possibilities for injustice, incompetence, perjury, and fraud''); *see also Com. v. Upshur*, 924 A.2d 642, 647-48 (Pa. 2007) (''any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document''). For that reason, longstanding English and American tradition recognizes public access to judicial records and documents, Erica A. Kaston, Note, *The Expanding Right of Access: Does It Extend to Search Warrant Affidavits?*, 58 Fordham L. Rev. 655, 661 (1990).

[Headnote 1]

Although public access is favored, it is not unfettered. A court's authority to limit or preclude public access to judicial records and documents stems from three sources: constitutional law, statutory law, and common law. *See Com. v. Silva*, 864 N.E.2d 1, 5 (Mass. 2007) (observing that Massachusetts right of public access to judicial documents is governed by overlapping constitutional, statutory, and common-law rules); *Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928) (stating that in the absence of statutory grant of inspection of access to public documents and records, court looks to common-law principles); *In re Caswell*, 29 A. 259 (R.I. 1893) (applying common law because no statute existed relating to access to public records). Because no constitutional or statutory provision expressly speaks to public access to judicial records and documents in criminal proceedings in this court, we must consider the common law applicable to Nevada in resolving the issue before us.

As with other federal and state jurisdictions in the United States, Nevada follows the common law of England, barring any conflict with federal and state constitutional or statutory law. *See* NRS 1.030; *see also Hogan v. State*, 84 Nev. 372, 373, 441 P.2d 620,

621 (1968) (''The term common law, has reference not only to the ancient unwritten law of England, but also to that body of law created and preserved by the decisions of courts as distinguished from that created by the enactment of statutes by legislatures.'') The common law, as assimilated into American law, is comprised of English decisions, early writers on common law, and commentaries enunciating the common law as far as they are applicable to American conditions and usages. *See Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968) (accepting Blackstone's Commentaries as the most satisfactory exposition of common law); *Wheaton v. Peters*, 33 U.S. 591, 658-59 (1834) (observing that when our ancestors migrated to the United States, they brought with them, to a limited extent, the English common law as part of their heritage; ''No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this Union. It was adopted, so far only as its principles were suited to the condition of the colonies.''); *Dougan v. State*, 912 S.W.2d 400, 403 (Ark. 1995) (''In ascertaining the common law, we look not only at our cases, but to early English cases, early writers on the common law, and cases from other states.''). American jurisprudence originates from English common law. *Richmond*, 448 U.S. at 565-73; *U.S. v. Gotti*, 322 F. Supp. 2d 230, 239 (E.D.N.Y. 2004); Kaston, *supra*, at 661. However, American common law is not without distinction from its English roots. *See Reno S. Works v. Stevenson*, 20 Nev. 269, 276, 21 P. 317, 319 (1889) (concluding that the ''intention of the legislature was to adopt only so much of [the common law of England] as was applicable to our condition'').

[Headnote 2]

With respect to the common-law right to inspect and copy public records, American courts offered a broader interpretation of that right. Contrary to English practice, American courts ''generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.'' *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Nowack*, 219 N.W. at 750-51; *see also* Anne-Therese Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 Notre Dame L. Rev. 117, 120-21 (1990) (noting that ''[u]nder the English system all persons enjoy the common-law right of access, but only those with a proprietary or evidentiary interest in the documents can enforce the right if access is wrongfully denied''; American common law does not impose such a restriction). Nevertheless, English and American common law enjoy commonality in the long-standing recognition of the public's right to inspect and copy public records, including judicial records and documents. *Nixon*, 435 U.S. at 597 (''It is clear that

the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.''); *U.S. v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (observing that common-law right of access to judicial documents predates the Constitution); *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (observing that common-law right to inspect public records extends to judicial records), *reversed on other grounds by Nixon*, 435 U.S. 589; *Ex parte Drawbaugh*, 2 App. D.C. 404 (D.C. Cir. 1894).

[Headnote 3]

Concomitant with the common-law right to public access to such information is the recognition that the right is not absolute. *Nixon*, 435 U.S. at 598 (''It is uncontested, however, that the right to inspect and copy judicial records is not absolute.''); *Silva*, 864 N.E.2d at 6 (observing that common-law right of access to judicial records is not absolute and ''must yield to a trial judge's decision to impound records for 'good cause' ''); *Upshur*, 924 A.2d at 651 (recognizing that right to examine public judicial documents is not absolute). ''Every court has supervisory power over its own records and files,'' and the decision to allow access to court records is best left to the sound discretion of the court. *Nixon*, 435 U.S. at 598; *Roman Cath. Diocese of Lexington v. Noble*, 92 S.W.3d 724, 730 (Ky. 2002) (observing that court has inherent authority over its own records and therefore has discretionary authority to deny access to its records and files); *Werfel v. Fitzgerald*, 260 N.Y.S.2d 791, 797 (App. Div. 1965) (''A court may order papers sealed and inspection prohibited except by further order of the court, sometimes by express provision of a statute . . . and sometimes by use of a power said to be inherent in the authority of the court.''); *Upshur*, 924 A.2d at 651 (recognizing that ''courts retain supervisory powers over their records and documents''); *Ex Parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 469 (S.C. 2006) (observing that restriction on public access to judicial records may originate from ''the court's inherent power to control its own records and supervise the functioning of the judicial system''). In fact, we have recognized that this court has inherent authority, albeit not absolute, to perform basic functions of the judiciary, which ''encompasses powers reasonable and necessary for the administration of court procedure and management of judicial affairs.'' *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 300, 279 P.3d 166, 173 (2012) (internal quotations omitted).

With acute awareness of the presumption favoring public access to judicial records and documents, federal and state courts have decided that a court may exercise its inherent authority to seal those materials only where the public's right to access is outweighed by competing interests. *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D.

118, 120-21 (D. Md. 2009) (stating that although common law presumes right of public access to judicial records, presumption may be rebutted if countervailing interests heavily outweigh public interest in access); *U.S. v. Jacobson*, 785 F. Supp. 563, 569 (E.D. Va. 1992) (acknowledging trial court's supervisory power over its own records and inherent discretion to seal documents if the public's right to access is outweighed by competing interests); *State v. Archuleta*, 857 P.2d 234, 240-41 (Utah 1993) (noting that common-law right to public access to documents in criminal cases is not absolute and court has discretion to seal documents if right to public access is outweighed by competing interests); *In re Sealed Documents*, 772 A.2d 518, 526 (Vt. 2001) (''The common law has long recognized that courts are possessed of an inherent authority to deny access to otherwise public court records when necessary to serve overriding public or private interests.''). Courts also recognize that the party seeking to overcome the presumption of public access bears the burden of demonstrating a significant interest that outweighs this presumption. *Bank of America Nat. Trust v. Hotel Rittenhouse*, 800 F.2d 339, 344 (3d Cir. 1986); *Rufer v. Abbott Laboratories*, 114 P.3d 1182, 1187 (Wash. 2005) (''The party wishing to keep a record sealed usually has the burden of demonstrating the need to do so.'').

Because the common-law right to access is broader than the other sources of that right—constitutions and statutes—jurisdictions vary in their approaches to striking a balance between the public's right of access to judicial records and competing privacy interests. *See Arkansas Best v. General Elec. Capital*, 878 S.W.2d 708, 712 (Ark. 1994) (concluding that ''beyond the instances described in the statute or rules, the 'inherent' authority of a trial court to seal records must be very limited in view of the strong common law right of access''); *Holcombe v. State*, 200 So. 739, 746 (Ala. 1941) (concluding that public has a common-law right of access to judicial records where access is not sought out of speculation or idle curiosity); *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974) (concluding that common-law right of access ''must be premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest'' and observing that ''no person has the right to demand inspection of public records to satisfy idle curiosity or for the purpose of creating a public scandal''); *In re Caswell*, 29 A. at 259 (''The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining same; but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records.''). We recognized this tension in *State*

v. Grimes, where we observed that there are stronger reasons to deny public access to judicial records concerning private matters when the public access ''could only serve to satiate a thirst for scandal.'' 29 Nev. 50, 81, 84 P. 1061, 1071 (1906).

[Headnotes 4-7]

From the principles outlined above, we can draw several conclusions relevant to the issue before us. First, there exists a presumption in favor of public access to records and documents filed in this court. Second, under common law, to which Nevada assents, this court retains supervisory power over its records and possesses inherent authority to deny public access when justified.[3] Third, this presumption may be abridged only where the public right of access is outweighed by a significant competing interest. And finally, the party seeking to seal a record or document carries the burden of demonstrating sufficient grounds for denying access. With these tenets in mind, we turn to the procedures that a party must follow when seeking to have a court record or document sealed in a criminal case pending before this court.

Because we have no rule outlining the procedures for sealing court documents and records in criminal proceedings, we look to other sources for guidance. For example, several federal courts have rules outlining the obligations a party bears when seeking to seal documents or records. Although the specific requirements vary, they generally share the following features: (1) the requesting party must file a motion, (2) the motion must identify the information the party seeks to seal, (3) the motion must set forth the reasons why sealing is necessary, and (4) the motion must specify the duration of the sealing order. *See* 1st Cir. R. 11.0(c)(2) (''In order to seal in the court of appeals materials not already sealed in the district court or agency . . . a motion to seal must be filed in paper form in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them 'sealed.' A motion to seal, which should not itself be filed under seal, must explain the basis for sealing and specify the duration of the sealing order.''); 3d Cir. R. 106.1(a) (''If a party believes that a portion of a brief or other document merits treatment under seal, the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary. Any other party may file objections, if any, within 7 days. A motion to seal must explain the basis for sealing and specify the desired duration of the sealing

[3]In *Johanson v. District Court*, we declined to consider whether a district court has inherent authority to completely seal a divorce case beyond the provisions of NRS 125.110, which permits the sealing of portions of the record in divorce cases, because the real party in interest had ''failed to demonstrate that the district court's order sealing the entire case file was a necessary exercise of that power to protect his or any other person's rights or to otherwise administer justice.'' 124 Nev. 245, 250, 182 P.3d 94, 97-98 (2008).

order.''); 4th Cir. R. 25(c)(2)(B) (''Any motion to seal filed with the Court of Appeals shall: (i) identify with specificity the documents or portions thereof for which sealing is requested; (ii) state the reasons why sealing is necessary; (iii) explain why a less drastic alternative to sealing will not afford adequate protection; and (iv) state the period of time the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.''); D.S.C. Civ. R. 5.03(A) (''A party seeking to file documents under seal shall file and serve a 'Motion to Seal' accompanied by a memorandum . . . . The memorandum shall: (1) identify, with specificity, the documents or portions thereof for which sealing is requested; (2) state the reasons why sealing is necessary; (3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; and (4) address the factors governing sealing of documents reflected in controlling case law.''). Those rules also explain how the subject material will be protected pending resolution of the sealing motion. *See* 1st Cir. R. 11.0(c)(2) (''If discussion of confidential material is necessary to support the motion to seal, that discussion shall be confined to an affidavit or declaration, which may be filed provisionally under seal.''); 3d Cir. R. 106.1(a) (''If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal.''); 4th Cir. R. 25(c)(2)(C) (''A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 days before the Court rules on the motion, but the materials subject to the motion to seal will be held under seal pending the Court's disposition of the motion.'').

[Headnotes 8, 9]

We take direction not only from the federal courts but also our own rules. SRCR 3 explains the procedures for sealing court records in civil cases. The fundamental aspects of that rule require the party requesting that the court seal court records to file a written motion and serve the motion on all parties involved in the action. SRCR 3(1). The information to be sealed remains confidential for a reasonable period of time until the court rules on the motion. SRCR 3(2). The motion must establish appropriate grounds to seal the record or document. *See* SRCR 3(4).[4] Consistent with the federal approach, SRCR 3, and our overarching concern in safeguarding openness and transparency in the criminal judicial process, we impose the following requirements for sealing

[4]The rule identifies the grounds where the public interest in privacy and safety concerns outweigh the public interest in open court records, and therefore the sealing of a particular court record is justified. SRCR 3(4). Limitations on sealing are also explained in the rule, including that the sealing of an entire court file is prohibited and that should the court order sealing, it ''shall use the least restrictive means and duration.'' SRCR 3(5)(b), (c); SRCR 3(6).

records and documents in the criminal cases pending in this court. First, a party seeking to seal a document must file a written motion and serve the motion on all parties involved in the action. Second, the motion must identify the document or information the party seeks to seal. Third, the motion must identify the grounds upon which sealing the subject documents is justified and specify the duration of the sealing order. Although not an exhaustive list, examples of court records in criminal proceedings that may be sealed in this court include records containing privileged attorney-client communications where the privilege has not been waived, records containing information that is permitted or required under federal or Nevada law to be sealed, and records containing information the sealing of which is justified or required by an identified significant competing interest. Fourth, the motion must explain why less restrictive means will not adequately protect the material. The records or documents that are the subject of the motion may be submitted separately and will remain confidential for a reasonable period of time pending this court's resolution of the motion.

[Headnote 10]

Here, Howard's attempt to seal documents related to the motion for substitution of counsel suffers from two significant deficiencies. First, he initially did not file a separate motion seeking to seal the substitution motion but rather presumed that labeling it as sealed would make it so. Although the procedures we have set forth in this opinion are prospective, Howard's obligation to file a separate written motion is not new. *See* NRAP 27(a)(1) (providing that ''[a]n application for an order or other relief is made by motion unless these Rules prescribe another form''). Therefore, Howard's unilateral attempt to seal the pleadings was insufficient, even under our current rules for seeking relief from this court.

Second, the documents that Howard seeks to seal are not appropriate for sealing. Although his substitution motion did not set forth any basis for sealing it, Howard argues in subsequent pleadings that the motion and all documents related to the motion should be sealed because they contain privileged and confidential information that directly impacted the attorney-client relationship between him and the Nevada Federal Public Defender's Office. It also appears that Howard suggests that the pleadings reveal potential defense strategies that should remain shielded from public inspection. We disagree.

[Headnotes 11, 12]

Howard contends that information about close personal relationships between his former post-conviction counsel and attorneys with the Nevada Federal Public Defender, which he claims created

a conflict of interest, should be sealed to protect privileged information concerning the attorney-client relationship. Howard misapprehends the nature of the matters he seeks to seal. Although he argues that the subject documents contain privileged attorney-client communications, they do not. NRS 49.095 limits the attorney-client privilege to (1) confidential communications (2) between the lawyer (or representative) and the client (or representative) (3) ''[m]ade for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.'' While a conflict of interest may touch upon the attorney-client relationship itself where the attorney ''is placed in a situation conducive to divided loyalties,'' *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991); *see* RPC 1.7(a) (providing that conflict of interest exists where ''(1) [t]he representation of one client will be directly adverse to another client; or (2) [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer''), the facts establishing the existence of a conflict of interest do not necessarily implicate the attorney-client privilege. The documents at issue here do not disclose the contents of any privileged communication between Howard and his attorneys or any other confidential information. At most, they include general statements about the facts that create the alleged conflict of interest, and while those facts may be embarrassing, the information in the documents is not detailed or specific and does not involve the attorneys' relationships or communications with Howard or any information that is confidential, *see* RPC 1.6. Although we can appreciate the desire to avoid unnecessary embarrassment, that alone is insufficient to warrant sealing court records from public inspection. *See* Hon. T.S. Ellis, III, *Sealing, Judicial Transparency and Judicial Independence*, 53 Vill. L. Rev. 939, 946 (2008) (''A common, although not always explicit, reason proffered for sealing is a party's fear of embarrassment. It is pellucidly clear that this reason cannot justify sealing; the public's rights or access should never be outweighed by the risk of embarrassment or harm to reputation.''). And to the extent that Howard suggests that the information that must be protected is the possibility that he may assert, in pending or future federal or state proceedings, that his former counsel was ineffective and may seek relief based on recent Supreme Court decisions—*Maples v. Thomas*, 132 S. Ct. 912 (2012), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)—thus revealing his strategy in those future proceedings, we are not convinced that this information reveals any confidential information that warrants protection from public inspection.

Because Howard's efforts to seal the subject pleadings were not accompanied by a motion requesting relief and he has not identified a sufficiently significant interest that overrides the right to public access to records and documents filed in this court, we conclude that sealing the pleadings related to the substitution motion is not justified. Accordingly, we deny Howard's motion to strike the State's motion for reconsideration and direct respondent's conduct, grant the State's motion for reconsideration, and deny Howard's motion to seal all pleadings related to the substitution of counsel. The clerk of this court shall unseal the documents filed on September 18, 2012; September 24, 2012; September 28, 2012; and October 8, 2012.

SAITTA and PICKERING, JJ., concur.

JERMAINE BRASS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 56042

December 27, 2012 291 P.3d 145

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, grand larceny, conspiracy to commit kidnapping, first-degree kidnapping, conspiracy to commit murder, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Defendant was convicted in the district court of numerous offenses, including first-degree kidnapping. Appeal followed. The supreme court, DOUGLAS, J., held that: (1) dismissal of a prospective juror by the district court before holding a *Batson* hearing on whether the State, which had used peremptory challenges against that juror and others, had legitimate race-neutral reasons for its challenges was structural error; and (2) evidence was sufficient to support a conviction for first-degree kidnapping.

Reversed and remanded.

[Rehearing denied February 28, 2013]

Christopher R. Oram, Ltd., and *Christopher R. Oram*, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens* and *David L. Stanton*, Chief Deputy District Attorneys, and *Nancy A. Becker*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   In reviewing a district court's resolution of a *Batson* challenge, the supreme court affords great deference to the district court's determination of whether there has been discriminatory intent in the exercise of peremptory challenges.
2. CRIMINAL LAW.
   Discriminatory jury selection in violation of *Batson* constitutes ''structural error,'' or error that affects the framework of a trial.
3. CRIMINAL LAW.
   Structural error necessitates automatic reversal because such error is intrinsically harmful.
4. CONSTITUTIONAL LAW.
   Use of peremptory challenges in a racially discriminatory manner is a violation of the Equal Protection Clause. U.S. CONST. amend. 14.
5. CONSTITUTIONAL LAW.
   The supreme court follows the three-step *Batson* analysis to determine whether there has been a violation of the Equal Protection Clause by the use of a peremptory challenge in a racially discriminatory manner. U.S. CONST. amend. 14.
6. JURY.
   The *Batson* inquiry requires the opponent of a peremptory challenge to first set forth a prima facie case of racial discrimination.
7. JURY.
   Once a prima facie case of racial discrimination has been set forth by the opponent of a peremptory challenge, the burden of production shifts to the proponent of the strike to proffer a race-neutral explanation for the challenge; this second step in the *Batson* inquiry is concerned with only the facial validity of the explanation.
8. JURY.
   If a race-neutral explanation for a peremptory challenge is tendered by the proponent of the challenge, the trial court must then decide, as the third step of the *Batson* analysis, whether the opponent of the strike has proved purposeful racial discrimination.
9. JURY.
   In a district court's consideration of a *Batson* challenge, implausible or fantastic justifications for the use of a peremptory challenge may be found to be pretexts for purposeful discrimination.
10. JURY.
    As part of a *Batson* analysis, the proponent of peremptory challenges must give a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges.
11. JURY.
    In the context of a *Batson* analysis, a reason for exercising a peremptory challenge must be related to the particular case.
12. JURY.
    In the context of a *Batson* analysis, a legitimate reason for using a peremptory challenge is not a reason that ''makes sense'' but one that does not deny equal protection. U.S. CONST. amend. 14.
13. JURY.
    Dismissal of a prospective juror by the district court before holding a *Batson* hearing on whether the State, which had used peremptory challenges against that juror and others, had legitimate race-neutral reasons for its challenges was structural error in a prosecution for kidnapping and other offenses; the dismissal before a hearing had the same effect as a

racially discriminatory peremptory challenge because defendant and co-defendant would be left with limited recourse even if they were able to prove purposeful discrimination.

14. KIDNAPPING.
Evidence was sufficient to show that defendant willfully enticed victim to leave his house for the purpose of killing him, so as to support a conviction for first-degree kidnapping; codefendant arrived at victim's home, an argument ensued between codefendant and victim, victim eventually walked out of his home, codefendant allegedly signaled to an unidentified man who then shot victim, evidence was presented that the unidentified man was defendant, and the evidence suggested that there was a specific plan to lure victim outside of the home for defendant to have a clear shot at him. NRS 200.310(1).

15. CONSTITUTIONAL LAW.
Due Process Clause requires each element that constitutes a crime be proven beyond a reasonable doubt. U.S. CONST. amend. 14.

16. CRIMINAL LAW.
When reviewing a criminal conviction for sufficiency of the evidence, the supreme court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution.

17. CRIMINAL LAW.
A jury's verdict will not be disturbed on appeal when there is substantial evidence supporting it.

18. DOUBLE JEOPARDY.
Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence that it failed to muster in the first proceeding. U.S. CONST. amend. 5.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether a district court committed reversible error by dismissing a prospective juror before conducting a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and whether there was sufficient evidence to support a kidnapping conviction. We hold that when a defendant asserts a *Batson* violation, it is a structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it. We further conclude that the insufficiency-of-evidence argument has no merit. Based on the structural error related to the alleged *Batson* violation, we reverse and remand.

FACTS

The victim in this case, Ernest Mitchell, was married to appellant Jermaine Brass's sister, Katrinna. In January 2009, Ernest and

Katrinna returned home to discover that their front door had been kicked in; the only items that were missing from their home were tires and rims that Ernest had recently purchased. Katrinna testified that Ernest suspected that someone in her family was to blame because they were the only ones who knew about the tires and rims and where the couple lived. Katrinna and Ernest confronted some of Katrinna's brothers, but all denied their involvement.

An eyewitness would later testify that, on the day of the burglary, he had seen two men loading tires and rims into a compact, four-door car with the Nevada license plate 578VCB. Jermaine's girlfriend would testify that, at the time of the burglary, she owned a black Kia with the license plate 578VCB and that Jermaine had her permission to drive it.

The day following the burglary, one of Katrinna's brothers, Ronnie Brass, stopped by Ernest and Katrinna's home. Katrinna answered the door and told Ronnie to leave. However, Ernest arrived at the door and began to argue with Ronnie. The argument escalated and continued outside. Ronnie allegedly made a gesture with his hands, and an unidentified man appeared and started shooting at Ernest, who was hit a number of times before he fell. The shooter then walked over to Ernest and shot him in the head. Katrinna testified that Ronnie watched the shooter and then told him, ''You're going to have to shoot that bitch Trinna or she's going to tell on us too.'' She also testified that the shooter then said to Ronnie, ''Come on, Ronnie, let's go.'' The two men then ran away. The shooter's face was covered; however, Katrinna testified that the shooter's complexion was consistent with Jermaine's and that she was ''sure it was [Jermaine's] voice.''

During the investigation, the police interviewed Jermaine and he admitted that Ernest had confronted him about the rims but denied involvement with the burglary or the shooting. He also told the police that he did not know where Ernest and Katrinna lived; however, latent prints taken from the damaged front door matched Jermaine's left palm prints.[1]

The State charged Jermaine and Ronnie as codefendants with (1) burglary, (2) grand larceny, (3) conspiracy to commit kidnapping, (4) first-degree kidnapping, (5) conspiracy to commit murder, and (6) murder with the use of a deadly weapon.[2] Jermaine filed a motion to sever his trial from Ronnie's trial and to sever the burglary and grand larceny charges from the other charges. Jermaine's motion to sever was joined by Ronnie. The district court denied the motion.

---

[1]The record indicates that the prints must have been left prior to the shooting because Katrinna testified that the shooter never touched the front door.

[2]Ronnie's appeal is currently pending before this court, *Brass (Ronnie) v. State*, Docket No. 56146. However, on March 22, 2012, Ronnie died from a stab wound to the chest while serving his sentence in Ely State Prison.

During voir dire, defense counsel objected to the State's use of a peremptory challenge against prospective juror no. 173, noting that she was the second African American stricken from the venire. Defense counsel argued that the State had exercised its peremptory challenges based on race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and that prospective juror no. 173 was qualified to be a juror. The district court gave all prospective jurors a 15-minute break and indicated that it would hold the *Batson* hearing regarding prospective juror no. 173 during the break. However, prior to the break and the *Batson* hearing, the district court permanently excused a number of potential jurors, including prospective juror no. 173. The district court did this despite defense counsel's suggestion that the jurors be excused after the hearing on the *Batson* challenge. Subsequently, the district court conducted a *Batson* hearing and concluded that the State had race-neutral reasons for its peremptory challenges. Thus, it denied the defense's *Batson* challenge. The jury found Jermaine guilty on all six counts.

DISCUSSION

On appeal, Jermaine argues that the district court erred in denying his *Batson* challenge and that there was insufficient evidence to support his kidnapping conviction.[3]

Jermaine's claim of discriminatory jury selection

[Headnotes 1-3]

In reviewing the district court's resolution of a *Batson* challenge, we afford great deference to its determination of whether there has been discriminatory intent in the exercise of peremptory challenges. *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008). Discriminatory jury selection in violation of *Batson* constitutes structural error, or error that affects the framework of a trial. *Id.* at 423, 185 P.3d at 1037; *Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008). Structural error necessitates automatic reversal because such error is ''intrinsically harmful.'' *Cortinas*, 124 Nev. at 1024, 195 P.3d at 322.

---

[3]Jermaine also argues that NRS 200.450 is void for vagueness, the State offered invalid theories for his murder conviction, the district court made evidentiary errors requiring reversal, assistance of counsel at trial was ineffective, the district court gave incorrect jury instructions, the district court's denial of his motion to sever his trial violated his rights guaranteed by the Confrontation Clause of the United States Constitution, and cumulative error requires reversal. However, in light of our resolution in this appeal, these additional issues need not be reached.

[Headnotes 4, 5]

The use of peremptory challenges in a racially discriminatory manner is a violation of the Equal Protection Clause. *Batson*, 476 U.S. at 89. We follow the three-step *Batson* analysis to determine whether there has been a violation. *Washington v. State*, 112 Nev. 1067, 1070, 922 P.2d 547, 549 (1996); *Doyle v. State*, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004).

[Headnotes 6-8]

Batson requires the opponent to the peremptory challenge to first set forth a prima facie case of racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Once a prima facie case has been set forth, the burden of production shifts to the proponent of the strike to proffer a race-neutral explanation for the challenge. *Id.* This second step in the inquiry is concerned with only the facial validity of the explanation. *Id.* at 768. Finally, ''[i]f a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.'' *Id.* at 767.

[Headnotes 9-12]

In the district court's consideration of a *Batson* challenge, ''implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'' *Id.* at 768. The proponent of the strike '' 'must give a ''clear and reasonably specific'' explanation of his ''legitimate reasons'' for exercising the challenges.' '' *Id.* (quoting *Batson*, 476 U.S. at 98 n.20). The reason must be '' 'related to the particular case.' '' *Id.* at 768-69 (quoting *Batson*, 476 U.S. at 98). A legitimate reason is not a reason that ''makes sense'' but one that does not deny equal protection. *Id.* at 769.

[Headnote 13]

Here, the district court dismissed prospective juror no. 173 prior to holding the hearing to determine whether the State had legitimate race-neutral reasons for its challenges.[4] The defendants

---

[4]While we resolve this appeal on other grounds, we note our concern with the possibility that the dismissal of a prospective juror before holding a *Batson* hearing may present the appearance of improper judicial bias. *See* NCJC 2.3(B) (''A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, . . . based upon race . . . .''); *cf. Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (''Remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence.'').

were not afforded an adequate opportunity to respond to the State's proffer of race-neutral reasons or to show pretext because the district court permanently excused prospective juror no. 173 before holding a *Batson* hearing. Dismissing this prospective juror prior to holding the *Batson* hearing had the same effect as a racially discriminatory peremptory challenge because even if the defendants were able to prove purposeful discrimination, they would be left with limited recourse.[5] This discriminatory jury selection constitutes structural error that was intrinsically harmful to the framework of the trial. Therefore, reversal is warranted. *See Cortinas*, 124 Nev. at 1024, 195 P.3d at 322.

Jermaine's claim of insufficient evidence to support his kidnapping conviction

[Headnotes 14-18]

Jermaine argues that the State did not present sufficient evidence to convict him of kidnapping.[6] The Due Process Clause of the United States Constitution requires each element that constitutes a crime be proven beyond a reasonable doubt. *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). When reviewing a criminal conviction for sufficiency of the evidence, this court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *Id*. The jury's verdict will not be disturbed on appeal when there is substantial evidence supporting it. *LaPierre v. State*, 108 Nev. 528, 530, 836 P.2d 56, 57 (1992).

Under NRS 200.310(1), a person is guilty of first-degree kidnapping if that person willfully ''inveigles, [or] entices . . . a person by any means whatsoever . . . for the purpose of killing the person or inflicting substantial bodily harm upon the per-

---

[5]We note that, if the district court held the *Batson* hearing *prior* to excusing prospective juror no. 173 and it found purposeful discrimination, recourse would be needed. Possible remedies could include allowing her to remain in the jury pool, discharging the entire venire and selecting a new jury, or calling additional jurors to the venire and granting additional peremptory challenges. *See, e.g.*, *Batson*, 476 U.S. at 99-100 n.24; *Caston v. Costello*, 74 F. Supp. 2d 262, 271 (E.D.N.Y. 1999).

[6]Jermaine also makes the claim that there was insufficient evidence to support his conspiracy-to-commit-kidnapping conviction; however, he only offers arguments in support of his claim of insufficient evidence to support his kidnapping conviction. We review Jermaine's sufficiency-of-evidence argument despite our resolution of this appeal on other grounds because ''[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'' *Burks v. United States*, 437 U.S. 1, 11 (1978).

son . . . .'' Here, the record reflects that Ronnie arrived at the home of Ernest and Katrinna and an argument ensued between Ronnie and Ernest. The argument escalated and Ernest eventually walked out the front door of his house. Thereafter, Ronnie allegedly signaled to an unidentified man who shot Ernest. Evidence was presented that this unidentified man was Jermaine. This evidence viewed in the light most favorable to the State suggests that there was a specific plan to lure Ernest outside of the house for Jermaine to have a clear shot at him. Therefore, a rational jury could find that Jermaine had willfully enticed Ernest to leave his house for the purpose of killing him. Jermaine's insufficiency-of-evidence argument has no merit.

Based on the structural error related to the *Batson* challenge, we reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this opinion.

GIBBONS, J., concurring:

I agree with the majority that it is structural error to excuse a juror before the *Batson* objection and response is considered by the trial court. As the majority concludes, the proponent of a *Batson* strike must set forth legitimate reasons for exercising the challenge. One of the reasons set forth by the proponent for striking an African-American juror was that she is a registered Democrat who had ''Democratic'' views on law enforcement. Political affiliation is not a proper component as a basis for asserting a challenge to a juror.

PARRAGUIRRE, J., concurring:

I concur in the result only.

DYNAMIC TRANSIT COMPANY; AND KNIGHTS COMPANY/AUTO TRANSPORTERS, A MISSOURI BUSINESS ENTITY, APPELLANTS/CROSS-RESPONDENTS, *v.* TRANS PACIFIC VENTURES, INC.; AND TREVOR SMALL, RESPONDENTS/CROSS-APPELLANTS.

No. 58041

December 27, 2012 291 P.3d 114

Appeal and cross-appeal from a district court amended judgment, certified as final pursuant to NRCP 54(b), in a contract and tort action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Automobile owner sued interstate cargo carrier that transported the automobile from Nevada to Washington but refused to deliver it, asserting claims for, *inter alia*, conversion and fraud. After a bench trial, the district court entered judgment in owner's favor on his claims for conversion and fraud and awarded him $52,500 in compensatory damages and $300,000 in punitive damages. Carrier appealed, and owner cross-appealed. The supreme court, PARRAGUIRRE, J., held that: (1) owner alleged a state-law claim for true conversion against carrier, such that the Carmack Amendment to the Interstate Commerce Act did not preempt the claim as alleged; and (2) substantial evidence supported a determination that carrier engaged in an act of conversion against owner.

Affirmed in part and dismissed in part.

[Rehearing denied April 4, 2013]

[En banc reconsideration denied May 24, 2013]

Marquis Aurbach Coffing and *Micah S. Echols* and *Scott A. Marquis*, Las Vegas, for Appellants/Cross-Respondents.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and *David J. Larson* and *Jeremy R. Alberts*, Las Vegas, for Respondents/Cross-Appellants.

1. APPEAL AND ERROR.
   The supreme court lacked jurisdiction over automobile owner's cross-appeal from the district court's judgment in owner's favor on his claims for conversion and fraud against interstate cargo carrier; owner prevailed in the district court and thus was not aggrieved by the judgment. NRAP 3A(a).
2. CARRIERS; STATES.
   Automobile owner alleged a state-law claim for true conversion against interstate cargo carrier that transported the automobile but refused to deliver it, such that the Carmack Amendment to the Interstate Commerce Act did not preempt the claim as alleged, where owner alleged in his complaint that carrier had wrongfully asserted an act of dominion over his automobile for carrier's own gain, which was a denial of owner's rights to the property. 49 U.S.C. § 14706(a)(1).
3. PRETRIAL PROCEDURE.
   A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts that, if accepted by the trier of fact, would entitle the plaintiff to relief.
4. CARRIERS.
   Under the Carmack Amendment to the Interstate Commerce Act, which limits liability of a carrier to the actual loss or injury to goods that occurs during interstate transit, certain compensatory damages and punitive damages are not available. 49 U.S.C. § 14706(a)(1).
5. APPEAL AND ERROR.
   If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.

6. CARRIERS.
   Substantial evidence supported a determination that interstate cargo carrier engaged in an act of conversion against automobile owner by consciously seizing the automobile without authority to use it as leverage to obtain money from a transportation facilitator that had contracted with owner and with which carrier had payment disputes, where a dispatcher for carrier acknowledged that he sent a truck to pick up the automobile before reaching an agreement with facilitator, a driver for carrier who picked up the automobile testified that he never attempted to deliver it to owner, and, *inter alia*, owner testified that the dispatcher told him that he would not receive the automobile until facilitator paid carrier for money that it owed for past jobs.
7. APPEAL AND ERROR.
   The supreme court will not disturb a district court's findings of fact unless they are clearly erroneous or not supported by ''substantial evidence,'' which is evidence that a reasonable mind might accept as adequate to support a conclusion.
8. CONVERSION AND CIVIL THEFT.
   Liability for a claim of conversion is predicated upon an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.
9. CONVERSION AND CIVIL THEFT.
   Where a defendant keeps possession of the property he has converted, the injured party should receive full compensation based on actual loss.
10. APPEAL AND ERROR; DAMAGES.
    Broad discretion is given to a district court in calculating an award of damages, and such award will not be reversed unless there is an abuse of discretion; a determination of reasonable expenses will be upheld if supported by substantial evidence.
11. APPEAL AND ERROR.
    Interstate cargo carrier did not preserve for appellate review certain arguments that it made in a challenge to the district court's award of loss-of-use damages to automobile owner who prevailed on claim for conversion against carrier, where carrier did not object at trial to owner's request for loss-of-use damages and did not challenge the award of loss-of-use damages in its post-trial motion to amend judgment.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this opinion, we consider whether a shipper's state-law claim for conversion is necessarily preempted by the Carmack Amendment's federal liability limitation for interstate carriers, where the carrier was not authorized to take possession of the shipper's property but did so for its own gain. Recognizing that the Carmack Amendment does not apply in cases of true conversion, we conclude that sufficient evidence supports the district court's findings

and award of damages. Thus, we affirm the district court's judgment in respondents' favor.

FACTS AND PROCEDURAL HISTORY

In June 2007, respondent Trevor Small purchased a luxury sports car from Desert Audi in Henderson, Nevada, for the total price of $67,253.25.[1] Small contracted with Nex-Day Auto Transport, Inc., to facilitate delivery of the vehicle to Washington, with instructions that the vehicle be transported in an enclosed carrier. Nex-Day proceeded to advertise the job on an industry website. A dispatcher from appellants Dynamic Transit Company/Knights Company (collectively, Knights) called Nex-Day and offered to transport the vehicle. While on the phone, Nex-Day provided Knights' dispatcher with Small's delivery address and contact information. Nex-Day then faxed a work order with this information to Knights, which required that Knights agree to Nex-Day's terms in writing and return a signed copy to Nex-Day before accepting delivery of the vehicle.

This was not the first time that Knights had negotiated with Nex-Day for delivery of a vehicle. In fact, Nex-Day owed Knights approximately $9,650 for past-due invoices. Instead of signing and returning the work order provided for the transport of Small's car, the Knights dispatcher altered the terms of the agreement to include a pay-on-delivery clause and to provide for transport in an unenclosed carrier. The dispatcher proceeded to generate a bill of lading and arranged for a truck to pick up Small's vehicle from Desert Audi. Nex-Day never received a signed copy of the work order—altered or otherwise—from Knights. Thus, it faxed a cancellation to Knights and proceeded to solicit other carriers.

The next day, a Knights driver arrived at Desert Audi and began loading Small's vehicle onto an unenclosed carrier. Although a Desert Audi representative informed the driver that Knights was not authorized to transport the vehicle, the driver proceeded with pickup and departed with Small's car.

Once in possession, Knights transported the vehicle to Washington but demanded that Nex-Day tender payment for its unrelated past-due invoices before it would proceed with delivery. When Nex-Day failed to do so, Knights refused to deliver Small's vehicle, and it was ultimately transported to a storage facility in Missouri.

Small brought action against Knights, alleging various state-law claims, including conversion and fraud. In its answer, Knights denied any wrongdoing and set forth a number of affirmative

[1]Small is the sole owner of respondent Trans Pacific Ventures, Inc., and the vehicle was to be used in a company capacity. We refer to respondents collectively as Small.

defenses—none of which included an argument that Small's state-law claims were preempted by the Carmack Amendment.

Nearly one and a half years after filing its answer, Knights filed a motion to dismiss Small's complaint for failure to state a claim under NRCP 12(b)(5). Namely, Knights asserted that Small's state-law claims were preempted by the Carmack Amendment's federal liability limitation for interstate cargo carriers. Small responded that Knights had waived this defense by failing to timely raise it, and even if it had not waived it, the Carmack Amendment preemption did not apply because Knights was never contractually authorized to obtain possession of the vehicle. The district court concluded that the Carmack Amendment was inapplicable and denied Knights' motion to dismiss.

[Headnote 1]

Following a bench trial, the district court granted judgment in Small's favor regarding his state-law claims for conversion and fraud, awarding Small a total of $52,500 in compensatory damages and $300,000 in punitive damages. Knights then filed a motion to amend judgment, arguing that it was entitled to a $40,000 offset based on a pretrial, partial-settlement payment to Small. The district court declined to recalculate damages. This appeal followed.[2]

DISCUSSION

Knights contends that the district court erred in denying its motion to dismiss pursuant to NRCP 12(b)(5) because the Carmack Amendment preempts each of Small's state-law claims. Alternatively, Knights argues that even if the Carmack Amendment does not apply, there is insufficient evidence to support the district court's judgment. Finally, Knights argues that the district court erred in its award of compensatory damages. We disagree with each of Knights' contentions.

The district court properly denied Knights' motion to dismiss

[Headnote 2]

Knights argues that the district court erred in denying its motion to dismiss because the Carmack Amendment preempts state-law

---

[2]Small has also filed a cross-appeal, arguing that Knights waived its right to assert the Carmack Amendment as an affirmative defense by failing to raise it in its answer pursuant to NRCP 8(c), and that the district court erred by granting Knights post-trial leave to amend its answer pursuant to NRCP 15(b). Because Small prevailed below, he is not aggrieved by the district court's judgment, and we therefore lack jurisdiction over the cross-appeal. NRAP 3A(a); *Ford v. Showboat Operating Co.*, 110 Nev. 752, 756, 877 P.2d 546, 549 (1994) (''A party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved.''). Accordingly, we dismiss Small's cross-appeal.

claims so long as the carrier possesses a bill of lading, regardless of the circumstances under which the bill of lading was generated. Small asserts that, regardless of the bill of lading's propriety, the Carmack Amendment does not apply here because the facts of this case fall within an exception for ''true conversion.''

[Headnote 3]

A complaint should not be dismissed for failure to state a claim ''unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief.'' *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985). In reviewing the district court's denial of Knights' motion to dismiss, it is necessary for us to consider the preemptive scope of the Carmack Amendment as applied to the allegations in Small's complaint.

[Headnote 4]

The Carmack Amendment to the Interstate Commerce Act was enacted in 1906 to establish a uniform national liability policy for interstate carriers, and it limits carrier liability to ''the actual loss or injury'' to goods that occurs during interstate transit. 49 U.S.C. § 14706(a)(1) (2006); *New York, N.H. & H.R. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953). Accordingly, under the Carmack Amendment, certain compensatory damages and punitive damages are not available. The Supreme Court has explained that the Carmack Amendment's preemptive scope ''supersedes all the regulations and policies of a particular state.'' *Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913); *see also Rolf Jensen & Associates v. Dist. Ct.*, 128 Nev. 441, 445, 282 P.3d 743, 746 (2012) (''The preemption doctrine emanates from the Supremacy Clause of the United States Constitution, pursuant to which state law must yield when it frustrates or conflicts with federal law.'').

In considering the facts of this case, we turn to two Ninth Circuit Court of Appeals opinions for guidance. In *Hall v. North American Van Lines, Inc.*, the Ninth Circuit concluded that the Carmack Amendment preemption ''applies equally to fraud and conversion claims arising from a carrier's misrepresentations as to the conditions of delivery or failure to carry out delivery.'' 476 F.3d 683, 689 (9th Cir. 2007) (citing *Georgia, Fla., & Ala. Ry. v. Blish Co.*, 241 U.S. 190, 197 (1916)). However, ''when there has been a true conversion, i.e., where the carrier has appropriated the property for its own use or gain,'' the Ninth Circuit has held that ''it would be against public policy to permit the carrier to limit its liability and thus to profit from its own misconduct.'' *Glickfeld v. Howard Van Lines*, 213 F.2d 723, 727 (9th Cir. 1954). *See also Tran Enterprises, LLC v. DHL Exp. (USA), Inc.*, 627 F.3d 1004, 1009 (5th Cir. 2010) (''[W]here a carrier has intentionally con-

verted for its own purposes the property of the shipper, traditional true conversion claims should be allowed to proceed and [the Carmack Amendment's] limitations on liability should be considered inapplicable.''); *Mayflower Transit, Inc. v. Weil, Gotshal & Manges, L.L.P.*, No. Civ.A. 3:00-CV-549-P, 2000 WL 34479959 (N.D. Tex. Oct. 18, 2000) (concluding that the Carmack Amendment did not preempt a conversion claim where the stolen goods were not part of goods authorized to be shipped).

Applied here, Small's complaint alleged that Knights had wrongly asserted an act of dominion over his vehicle for its own gain, which was a denial of his rights to the property. Construing this allegation in Small's favor, the district court properly concluded that the Carmack Amendment did not preempt Small's claim for true conversion.

[Headnote 5]

Thus, the district court did not err in denying Knights' motion to dismiss with regard to Small's conversion claim.[3]

Sufficient evidence supports the district court's judgment

[Headnote 6]

Knights argues that even if the Carmack Amendment did not preempt Small's state-law claim, there is not sufficient evidence to support the district court's findings.

[Headnote 7]

This court will not disturb a district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence. *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996). Substantial evidence is that which '' 'a reasonable mind might accept as adequate to support a conclusion.' '' *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938)).

---

[3]While the conversion claim is appropriate, we acknowledge that the caselaw exempting true conversion from the Carmack Amendment preemption does not provide an exception for state-law fraud claims. Instead, caselaw suggests the opposite with regard to fraud. *See Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997) (concluding that fraud ''claims relating to the making of the contract for carriage are so closely related to the performance of the contract, and the measure of damages for such claims so likely to be the loss or damage to the goods, that they are also preempted by the Carmack Amendment''). Nonetheless, because the district court's finding of conversion warranted the compensatory and punitive damages awarded, we need not reverse the district court's judgment. ''If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.'' *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981).

[Headnote 8]

In Nevada, conversion is defined as ''a distinct act of dominion wrongfully exerted over personal property in denial of, or inconsistent with, title or rights therein or in derogation, exclusion or defiance of such rights.'' *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 328, 130 P.3d 1280, 1287 (2006). Liability for a claim of conversion is predicated upon ''an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.'' *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000).

Here, the record includes testimony from various witnesses that Knights lacked authority to transport the vehicle because Nex-Day never received a signed copy of the work order. In particular, the Knights dispatcher acknowledged at trial that he sent a truck to pick up Small's vehicle before reaching an agreement with Nex-Day, that he materially altered the work order, and that he could not recall whether he ever returned the modified work order to Nex-Day for approval. Next, Knights' driver testified that he never attempted to deliver the vehicle to Small, and a manager from Desert Audi testified that Knights was ''holding the car for ransom or hostage because Nex-Day owed him money from . . . previous business dealings.'' The record also indicates that Nex-Day sent a second fax to Knights on the same day that it sent the work order to cancel the job. Finally, Small testified that when he called to locate his vehicle, the Knights dispatcher was ''very belligerent'' and said, ''I have your vehicle, yes. You're not getting it back until Nex-Day pays us what money is owed for past jobs.''

Based on this evidence, a reasonable mind could accept that Knights had engaged in an act of conversion by consciously seizing the vehicle without authority in order to use that vehicle as leverage to obtain money from Nex-Day. *Richardson*, 402 U.S. at 401. Thus, we conclude that substantial evidence supports the district court's judgment in Small's favor.

The district court's award of damages is proper

Knights argues that the district court erred in calculating the $52,500 compensatory damages award by failing to offset its pretrial payment of $40,000 to Small, resulting in an excessive award of punitive damages in the amount of $300,000.

[Headnotes 9, 10]

Where a defendant keeps possession of the property he has converted, the injured party should receive full compensation based on actual loss. *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980), *overruled on other grounds by Evans*, 116 Nev. at 608, 611, 5 P.3d at 1050-51. Broad discretion is given to a dis-

trict court in calculating an award of damages, and such award will not be reversed unless there is an abuse of discretion. *Asphalt Prods. v. All Star Ready Mix*, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995). A determination of reasonable expenses will be upheld if supported by substantial evidence. *Id.*

[Headnote 11]

Following judgment in Small's favor, Knights filed a motion to amend judgment pursuant to NRCP 52(b) and NRCP 59(e), similarly arguing that the district court had failed to recognize its pretrial payment to Small in the amount of $40,000. The district court denied Knights' request, concluding that its award of $52,500 in compensatory damages reflected the vehicle's undisputed purchase price of $67,253.25, plus loss-of-use damages in the amount of $25,000, as offset by the $40,000 partial pretrial settlement.[4] Therefore, the record reflects that Knights' pretrial payment has already been applied as an offset to the district court's award.

We conclude the district court's award of compensatory damages is supported by substantial evidence and consistent with the testimony presented at trial. It is therefore unnecessary for us to revisit the punitive damages award because it remains within the statutory limit. NRS 42.005(1)(b).

In light of the foregoing, we affirm the district court's judgment.

DOUGLAS and GIBBONS, JJ., concur.

---

[4]Knights presents three additional challenges to the district court's compensatory damages award, arguing that loss-of-use damages (1) were not requested at trial, (2) are an improper double recovery because Small was compensated for the fair market value of the vehicle, and (3) are improper because Small disowned the vehicle at the outset of litigation.

With regard to the first argument, the record indicates that Small's complaint specifically includes consequential damages, and that the district court repeatedly confirmed prior to judgment that Small was seeking loss-of-use damages in the amount of $35 per day for the two years that Knights failed to reasonably deliver his vehicle (approximately $25,500). Knights did not object to Small's request at trial, nor did Knights challenge the district court's award of loss-of-use damages in its post-trial motion to amend judgment.

Therefore, we conclude that the remaining arguments have not been preserved for appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (''A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.''). We also note that Knights has failed to present relevant authority to support these arguments on appeal. *See* NRAP 28(a)(9)(A); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider arguments not cogently made or not supported by citations to salient authority). Accordingly, we do not address these arguments further.

IN THE MATTER OF A.B., A MINOR.

CLARK COUNTY DEPARTMENT OF FAMILY SERVICES, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE FRANK P. SULLIVAN, DISTRICT JUDGE, RESPONDENTS, AND RAMONA B.; AND GREGORY B., REAL PARTIES IN INTEREST.

No. 58048

December 27, 2012 291 P.3d 122

Original petition for a writ of mandamus challenging a district court order that rejected a dependency master's findings of fact, recommendation, and order of approval in an NRS Chapter 432B proceeding and dismissed the abuse and neglect petition.

County department of family services petitioned for writ of mandamus challenging the juvenile court's order that rejected a dependency master's findings of fact, recommendation, and order of approval in an abuse and neglect proceeding and dismissed the abuse and neglect petition. The supreme court, GIBBONS, J., held that: (1) the juvenile court was not obligated to adopt findings of dependency master in abuse and neglect proceeding, and (2) the juvenile court's finding that child was not a child in need of protection was not arbitrary or capricious.

Petition denied.

Steven B. Wolfson, District Attorney, and *Ronald L. Cordes*, Deputy District Attorney, Clark County, for Petitioner.

Aaron D. Grigsby, Las Vegas, for Real Parties in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   Mandamus is an extraordinary remedy, and it is within the supreme court's discretion whether a petition will be considered.
3. MANDAMUS.
   The supreme court may review a petition for writ of mandamus if there is an important issue of law that needs clarification.
4. MANDAMUS.
   Writ of mandamus relief is generally not available when an adequate and speedy legal remedy exists. NRS 34.170.
5. INFANTS; MANDAMUS.
   Department of Family Services could seek mandamus relief following juvenile court's order dismissing abuse and neglect petition; because

the lower court's order arose from a juvenile proceeding concerning child custody, it was not substantively appealable, so the Department's only remedy was by way of a petition for a writ of mandamus. NRAP 3A.

6. INFANTS.
The juvenile court should have relied on the standard of review provided in Eighth Judicial District Court rule regarding the powers delegated to dependency masters, rather than on the one provided in Rule of Civil Procedure regarding special masters, to guide its evaluation of the dependency master's findings of fact in an abuse and neglect proceeding. NRCP 53(e)(2); EDCR 1.46(g)(7).

7. INFANTS.
Although a dependency master has the authority to hear dependency cases and make findings and recommendations, a master does not possess the same powers conferred to a juvenile court judge; as a result, only the juvenile court judge makes the dispositional decision in a matter. Const. art. 6, § 6; EDCR 1.46(b).

8. INFANTS.
Juvenile court judge may not transfer his or her judicial decision-making power in dependency proceeding to a dependency master. EDCR 1.46(b).

9. INFANTS.
Since the ultimate disposition in a dependency case lies with the juvenile court, the dependency master's findings and recommendation are not binding on the court. EDCR 1.46(b).

10. INFANTS.
The juvenile court was not obligated to adopt findings of dependency master in abuse and neglect proceeding; the juvenile court had to exercise its own independent judgment in deciding how to resolve the case.

11. INFANTS.
The juvenile court is not required to rely on the dependency master's findings in a dependency proceeding, but, if the court chooses to so rely, it may do so only if the findings are supported by the evidence and not clearly erroneous.

12. INFANTS.
The juvenile court's finding that child was not a child in need of protection was not arbitrary or capricious; the court found that sister's hearsay statements to detective regarding sexual abuse were not sufficiently corroborated by other evidence. NRS 432B.330.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we address the juvenile court's[1] role when reviewing an objection to a dependency master's findings of fact and recommendation in an abuse and neglect proceeding. Although the juvenile court may adopt the master's findings of fact unless they

[1]NRS 62A.180(1) states: '' 'Juvenile court' means each district judge who is assigned to serve as a judge of the juvenile court pursuant to NRS 62B.010 or court rule.''

are clearly erroneous, a master's findings and recommendations are only advisory, and the juvenile court is not obligated to adopt them. The juvenile court ultimately must exercise its own independent judgment when deciding how to resolve a case. In the underlying matter, the juvenile court sustained the objection, based on the overall evidence, and dismissed the abuse and neglect petition. As we perceive no abuse of discretion by the juvenile court, we deny the petition.

FACTS AND PROCEDURAL HISTORY

The underlying proceedings were prompted when allegations of sexual abuse and sexual risk involving A.B., the 12-year-old minor child of real parties in interest Ramona B. and Gregory B., were reported to child protective services. Family Services Specialist Kim Artist, employed by petitioner Clark County Department of Family Services (DFS), and Henderson Police Department Detective Amber Swartwood conducted a joint investigation to determine whether A.B. was in need of protection. The allegations, made by Ramona's daughter from a previous relationship and A.B.'s older half sister, Imani D., were that Gregory had sexually abused Imani when she was a minor living with Gregory and Ramona. As part of the investigation, A.B., Imani, Ramona, and Gregory, among others, were interviewed.

Following the investigation, DFS filed an abuse and neglect petition under NRS Chapter 432B in the juvenile division of the district court, seeking to have A.B. declared a child in need of protection. In its petition, DFS asserted that Gregory sexually abused Imani, and that Ramona had neglected both children by allowing A.B. to have unsupervised contact with Gregory and by failing to seek counseling for Imani once Ramona knew or should have known that Gregory had sexually abused Imani. A.B. was placed into protective custody, but was allowed to remain in the home with Ramona after Gregory agreed to vacate the family home and remain outside of the home during the adjudicatory proceedings.

An evidentiary hearing was conducted on the petition before a dependency master. The testimony at the hearing centered on statements made by Imani to investigators. During her testimony, Imani stated that she was having trouble getting along with her college roommate and felt self-conscious, and, because of those feelings, Ramona advised her to consult with a college counselor. It was during a counseling session that Imani discussed a wrestling incident with Gregory that occurred when she was approximately 13 years old, where Gregory allegedly touched her private parts. Imani testified that she felt uncomfortable after the incident with Gregory and that the family held a meeting the next day to discuss

what had happened. Imani testified that Ramona took her to a counselor after the incident, but neither Imani nor Ramona was able to testify as to the details of any counseling. At the hearing, Imani denied that she had ever told investigators or her college counselor that Gregory came into her room at night, grabbed her while she was in her bed, and made sexual demands.

Detective Swartwood and DFS Specialist Artist both testified as to Imani's statements made to them during separate interviews. Detective Swartwood testified that Imani had told her about the wrestling incident and that Imani stated that she had repeatedly asked Gregory to stop. Detective Swartwood further stated that Imani discussed other instances in which Gregory had tried to kiss her. Gregory and Ramona objected to the investigators' testimony as hearsay, and the master overruled their objections.

DFS Specialist Artist's testimony echoed that of Detective Swartwood regarding the statements made by Imani. DFS Specialist Artist also testified as to Ramona's statements indicating that she never took Imani to counseling, that she received a call from Imani the night before the investigation was initiated and that Imani was upset because she had discussed the incidents involving Gregory with the college counselor, and that she was worried that she would have to turn Gregory in to the police. Again Gregory and Ramona objected to the testimony on the grounds of hearsay.

Ramona testified as to the wrestling incident and how she spoke separately to Imani to learn if there were any other incidents in which Imani felt uncomfortable around Gregory. Ramona stated that Imani did not identify any other incidents. Ramona also testified that she and Imani attended counseling after the incident, but that she could not recall the number of times that they attended counseling. She further stated that following the present investigation, she suggested, and Imani agreed, to seek counseling. The family hired Dr. Marilyn Palasky to treat Imani and help her understand her feelings. Ramona stated that she attended several therapy sessions with Imani. Ramona also testified that it was her opinion that Gregory did not abuse Imani, and when asked what she based her opinion on, Ramona stated that Imani had told her that Gregory did not abuse her. Gregory did not testify at the hearing.

Gregory and Ramona's only witness was Dr. Palasky. Dr. Palasky testified that she had diagnosed Imani with schizoaffective disorder. She explained that such a disorder could cause a person to not properly match his or her behavior and demeanor with reality. Dr. Palasky further testified that she believed that Imani sometimes had difficulty differentiating between reality and what was occurring in her mind. She also testified that Imani told her

that she had been abused and felt uncomfortable at home. But Dr. Palasky noted that Imani's story was not always consistent and that Imani could not always remember specific details of the incidents, except that Gregory touched her private parts during the wrestling incident. Dr. Palasky noted that Imani was not bothered by that incident, but was troubled by her inability to deal with her roommate. She further stated that Imani never told her that Gregory would come into her room and try to kiss her or have sex with her.

Following the hearing, the dependency master filed her findings of fact, recommendation, and order of approval. The master found that DFS had met its burden and shown by a preponderance of the evidence that A.B. was a child in need of protection, as the dependency master found that Gregory had sexually abused Imani when she was a minor residing in Gregory and Ramona's home. The master further found that Ramona had neglected Imani and A.B. by not providing them with the proper care in light of Gregory's conduct.

After the master's findings of fact and recommendation were filed, Gregory and Ramona timely filed in the juvenile court an objection to the findings and recommendation. In their objection, Gregory and Ramona argued, among other things, that the dependency master abused her discretion by admitting the investigators' hearsay statements. DFS opposed the objection and argued that the testimony given by investigators was not hearsay because it was used to impeach Imani's testimony during the hearing, and even if it was hearsay, all hearsay is admissible in abuse and neglect proceedings under NRS 432B.530(3).

The juvenile court conducted a hearing on the objection and determined that the allegations relating to Imani had no merit and that there was no corroborative evidence to support the investigators' improperly admitted hearsay testimony. The court ultimately entered a written order sustaining the objection and dismissing the abuse and neglect petition. The juvenile court stated that, although NRS 432B.530(3) allows for all relevant evidence to be admitted, it does not ''require the Court to allow the admission of all hearsay reports.'' The court further noted that even if it were to admit all the hearsay statements, there still remained a lack of corroborative evidence to support a finding that Gregory had a sexual intent to touch Imani while they were wrestling or that Imani's statements to the investigators were reliable. As such, the juvenile court found that the dependency master's findings were clearly erroneous, and the court dismissed the abuse and neglect petition because it determined that A.B. was not a child in need of protection under NRS 432B.330. This petition for extraordinary writ relief followed.

DISCUSSION

Standard of review

[Headnotes 1-4]

''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see* NRS 34.160. Mandamus is an extraordinary remedy, and it is within this court's discretion whether a petition will be considered. *Cote H. v. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). It is well settled that this court may review a petition if there is ''an important issue of law [that] needs clarification.'' *International Game Tech.*, 124 Nev. at 197, 179 P.3d at 559. Writ relief is generally not available, however, when an adequate and speedy legal remedy exists. NRS 34.170; *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

[Headnote 5]

In this case, because the lower court's order arises from a juvenile proceeding and concerns child custody, it is not substantively appealable under NRAP 3A, and therefore, DFS's only remedy is by way of a petition for a writ of mandamus. *See Matter of Guardianship of N.S.*, 122 Nev. 305, 311, 130 P.3d 657, 661 (2006) (recognizing that a writ of mandamus is the appropriate remedy when challenging an order concerning child custody in a juvenile proceeding). Because this petition raises an ''important legal issue in need of clarification, involving public policy,'' *International Game Tech.*, 124 Nev. at 198, 179 P.3d at 559, we exercise our discretion and consider this petition in order to address the standard of review governing a juvenile court's review of a dependency master's findings of fact and recommendations.

Juvenile court's review of dependency master's findings of fact and recommendations

In resolving this petition, we begin by examining the role of a dependency master in a juvenile proceeding and the proper function of the juvenile court when reviewing a master's findings of fact and recommendation.

In the Eighth Judicial District Court, dependency masters are routinely used to assist juvenile dependency judges in timely hearing abuse and neglect matters involving minor children. EDCR 1.45(a)(2); *see* NRS Chapter 432B; *see also* Nev. Const. art. 6, § 6(2)(a). A dependency master has ''all the inherent powers of the

dependency judge subject to the approval of the dependency judge.'' EDCR 1.46(b). After a master hears a case, he or she must present the supervising judge with all the documents related to the case, along with written findings of fact and a recommendation as to resolving the matter. EDCR 1.46(g). ''No recommendation of a master or disposition of a juvenile case will become effective until expressly approved by the supervising district court judge.'' EDCR 1.46(g)(9).

[Headnote 6]

Once the written findings and recommendation are served, ''a party, a minor's attorney, or guardian or person responsible for the child's custodial placement may file an objection motion'' with the supervising judge. EDCR 1.46(g)(5). When an objection to a master's findings and recommendation is filed, the judge ''will review the transcript of the master's hearing, unless another official record is pre-approved by the reviewing judge, and (1) make a decision to affirm, modify, or remand with instructions to the master, or (2) conduct a trial on all or a portion of the issues.'' EDCR 1.46(g)(7). ''A supervising district judge may, after a review of the record provided by the requesting party and any party in opposition to the review, grant or deny such objection motion.''[2] EDCR 1.46(g)(6). The final determination of the case rests with the juvenile court. *See* EDCR 1.46(g)(9).

[Headnotes 7, 8]

This court has recognized that ''[t]he constitutional power of decision vested in a trial court in child custody cases can be exercised only by the duly constituted judge, and that power may not be delegated to a master or other subordinate official of the court.'' *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962). Thus, although a master has the authority to hear dependency cases and make findings and recommendations, a master does not

---

[2]Here, the juvenile court relied on NRCP 53(e)(2) to declare the dependency master's findings of fact clearly erroneous. The juvenile court's reliance on NRCP 53(e)(2) was unnecessary. NRCP 53(c) provides that an ''order of reference to [a] master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only.'' But in juvenile dependency matters in the Eighth Judicial District Court, the powers delegated to dependency masters are specifically set forth, by rule, in EDCR 1.46(b). Thus, the juvenile court should have relied on the standard of review provided in EDCR 1.46(g)(7), rather than on the one provided in NRCP 53(e)(2), to guide its evaluation of the dependency master's findings of fact. This opinion does not limit the discretion of the district court when appointing special masters under NRCP 53, and all district courts maintain the ultimate right to control special masters' actions under NRCP 53(c), as well as the right to review special masters' actions.

possess the same powers conferred to a juvenile court judge through Article 6, Section 6 of the Nevada Constitution. As a result, only the juvenile court judge makes the dispositional decision in a matter. The judge may not transfer his or her judicial decision-making power to a master. *Cosner*, 78 Nev. at 245, 371 P.2d at 279.

[Headnote 9]

This is not to say that the juvenile court should not give serious consideration to the master's findings of fact and recommendation. However, since the ultimate disposition lies with the juvenile court, the master's findings and recommendation are not binding on the court. On this point, the Maryland courts have developed a sound body of law that we find helpful in resolving the present case. *See Domingues v. Johnson*, 593 A.2d 1133 (Md. 1991); *In re Danielle B.*, 552 A.2d 570 (Md. Ct. Spec. App. 1989); *Wenger v. Wenger*, 402 A.2d 94 (Md. Ct. Spec. App. 1979); *Ellis v. Ellis*, 311 A.2d 428 (Md. Ct. Spec. App. 1973).

When reviewing a master's findings of fact and recommendation in a domestic relations case, Maryland takes a two-step approach. *Ellis*, 311 A.2d at 430. The first step involves the juvenile court reviewing the evidence and testimony presented to the master. *Id.* On review, the judge may order de novo fact-finding, or alternatively, the judge may rely on the master's findings when the findings are ''supported by credible evidence and [are] not, therefore, clearly erroneous.'' *Wenger*, 402 A.2d at 97. This approach is similar to the procedures provided in the EDCR in that the juvenile court may conduct a trial de novo or approve a master's findings. EDCR 1.46(g)(7). Once the court determines the applicable facts, the second step used by the Maryland courts requires the court to exercise its independent judgment to determine, based on the facts and the law, the case's proper resolution. *In re Danielle B.*, 552 A.2d at 578; *Wenger*, 402 A.2d at 97.

With this framework in mind, we now address the merits of this petition and review the juvenile court's order to determine whether the court abused its discretion when it sustained the objection and dismissed the abuse and neglect petition.

The juvenile court did not abuse its discretion when it found that A.B. was not a child in need of protection

[Headnote 10]

In its original writ petition, DFS argues that the juvenile court abused its discretion in dismissing the underlying abuse and neglect petition by determining that the hearing master's findings were clearly erroneous and setting aside the hearing master's factual findings.

[Headnote 11]

As discussed above, the dependency master's findings must be carefully reviewed by the juvenile court, but a master's findings and recommendation are only advisory. *See Cosner*, 78 Nev. at 245, 371 P.2d at 279. The juvenile court is not required to rely on the master's findings, but if the court chooses to rely on the master's findings, it may do so only if the findings are supported by the evidence and not clearly erroneous. *Wenger*, 402 A.2d at 97. After reviewing the findings, the juvenile court is free to determine the applicable facts and to exercise its independent judgment in reaching a disposition. *In re Danielle B.*, 552 A.2d at 578; *Wenger*, 402 A.2d at 97.

[Headnote 12]

Here, the juvenile court held a hearing on the objection and considered the parties' arguments. The juvenile court properly conducted an independent judicial review of the record before the master and found that ''even if [it] were to admit the hearsay testimony of the Detective as to Imani's statement, there [was] a lack of corroborative evidence to indicate that Imani's statement to the Detective was reliable.'' Thus, regardless of whether the juvenile court excluded Detective Swartwood's testimony, the court's ultimate decision was that there was not sufficient evidence to support DFS's abuse and neglect petition.[3] We conclude that the record supports the juvenile court's decision and that the court acted within its discretion in sustaining the objection to the dependency master's findings and dismissing the NRS Chapter 432B petition. Accordingly, the juvenile court did not act arbitrarily or capriciously, and thus, the petition for writ of mandamus is denied.[4]

DOUGLAS and PARRAGUIRRE, JJ., concur.

---

[3]Because the juvenile court correctly held that sufficient evidence to support the petition would not exist even if the hearsay testimony was admitted, we need not address DFS's argument that the exclusion of this testimony as inadmissible hearsay was an abuse of discretion. Although the juvenile court misstated the law as to the admission of evidence in abuse and neglect proceedings, *see* NRS 432B.530(3), under these circumstances any error was harmless. NRCP 61 (stating that ''[n]o error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment . . . , unless refusal to take such action appears to the court inconsistent with substantial justice'').

[4]Having considered DFS's remaining arguments, we are not persuaded that writ relief is warranted.

STEPHEN L. FOSTER, APPELLANT, *v.*
COSTCO WHOLESALE CORPORATION, RESPONDENT.

No. 55284

December 27, 2012 291 P.3d 150

Appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Customer filed negligence action against warehouse store in connection with injuries sustained when customer tripped and fell over a wooden pallet. The district court granted summary judgment to store. Customer appealed. The supreme court, CHERRY, C.J., held that: (1) provision of Restatement (Third) of Torts: Physical and Emotional Harm, stating that a landowner owes a duty of reasonable care to entrants for risks that exist on the landowner's property, would be adopted; (2) the open and obvious nature of a dangerous condition does not automatically relieve a landowner from the general duty of reasonable care, but bears on the assessment of whether reasonable care was exercised by the landowner, abrogating *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962); and (3) genuine issues of material fact, precluding summary judgment, existed as to whether pallet was an open and obvious condition, whether store breached its duty of care to customer by allowing an open and obvious danger to exist and by permitting customer to encounter such an existing condition, and whether customer was partially at fault under comparative negligence theories.

Reversed and remanded.

Sterling Law, LLC, and *Beau Sterling*, Las Vegas; *Nettles Law Firm* and *Brian D. Nettles*, Henderson, for Appellant.

Nelson Law and *Sharon L. Nelson* and *Nicholas L. Hamilton*, Las Vegas, for Respondent.

1. NEGLIGENCE.
   Adopting provision of Restatement (Third) of Torts: Physical and Emotional Harm, which states that a landowner owes a duty of reasonable care to entrants for risks that exist on the landowner's property. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51.
2. NEGLIGENCE.
   The open and obvious nature of a dangerous condition does not automatically relieve a landowner from the general duty of reasonable care, but bears on the assessment of whether reasonable care was exercised by the landowner, abrogating *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962).

3. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. NRCP 56(c).
4. APPEAL AND ERROR.
   As part of its de novo review of a grant of summary judgment, the supreme court considers the evidence in a light most favorable to the nonmoving party. NRCP 56(c).
5. NEGLIGENCE.
   To prevail on a traditional negligence theory, a plaintiff must demonstrate that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.
6. NEGLIGENCE.
   Whether a defendant was negligent is generally a question of fact for the jury to resolve.
7. NEGLIGENCE.
   To establish entitlement to judgment as a matter of law on negligence claim, a defendant must negate at least one of the elements of negligence.
8. APPEAL AND ERROR.
   Whether a defendant in negligence action owed a duty to plaintiff is a question of law that the supreme court reviews de novo.
9. JUDGMENT.
   Genuine issues of material fact existed as to whether wooden pallet over which customer tripped at warehouse store was an open and obvious condition, whether store breached its duty of care to customer by allowing an open and obvious danger to exist and by permitting customer to encounter such an existing condition, and whether, even if store breached duty of care, customer was partially at fault under comparative negligence theories, precluding summary judgment in customer's negligence action.

Before CHERRY, C.J., PICKERING and HARDESTY, JJ.

OPINION

By the Court, CHERRY, C.J.:

During a trip to a Costco membership warehouse store, appellant Stephen L. Foster tripped and fell over a wooden pallet, which had been positioned in an aisle of the warehouse by a Costco employee. Thereafter, Foster filed a complaint against Costco for injuries sustained from his fall. Costco subsequently moved for summary judgment. The district court granted summary judgment to Costco, holding that Costco had not breached its duty of care because the hazard created by the pallet was open and obvious to Foster. Foster appealed.

[Headnote 1]

In this opinion, we examine the evolution of a landowner's duty of care to entrants on the landowner's property and refine the cur-

rent status of that duty. Traditionally, a landowner had no duty to protect entrants on the landowner's property from open and obvious dangers. This court, along with the vast majority of jurisdictions, has since embraced an exception when the landowner should anticipate the harm despite the hazard's open and obvious nature. By modifying the traditional rule, negligence laws throughout the country have progressed in favor of upholding the general duty of reasonable care. *See Moody v. Manny's Auto Repair*, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994) (''[A]n owner or occupier of land should be held to the general duty of reasonable care when another is injured on that land. . . . [and] determinations of liability should primarily depend upon whether the owner or occupier acted reasonably under the circumstances.''). In recognition of the continuing development of the law governing landowner liability, we adopt the rule set forth in the Restatement (Third) of Torts: Physical and Emotional Harm section 51, and consequently, we conclude that a landowner owes a duty of reasonable care to entrants for risks that exist on the landowner's property.

[Headnote 2]

In accordance with this position, we hold that the open and obvious nature of a dangerous condition does not automatically relieve a landowner from the general duty of reasonable care. The fact that a dangerous condition may be open and obvious bears on the assessment of whether reasonable care was exercised by the landowner. Here, the district court erred when it found as a matter of law that Costco did not breach a duty of care because the hazard created by the pallet was open and obvious to Foster. Questions remain as to whether the pallet over which Foster tripped was in fact an open and obvious condition, whether Costco acted reasonably under the circumstances by allowing a pallet to impede Foster's path through the aisle without warning, and whether Foster failed to exercise reasonable self-protection in encountering the pallet. Accordingly, we reverse the district court's summary judgment and remand this case for further proceedings.

FACTS

In October 2005, Foster visited a Costco store in Henderson, Nevada, with the intent of purchasing paper goods and general groceries. While searching for trash bags in the paper goods aisle, Foster's left toe caught the corner of a wooden pallet, which was covered by a slightly turned box. Foster fell and sustained injuries. He subsequently sued Costco in district court, alleging that Costco was negligent in creating a dangerous condition and in failing to warn him of the existence of the dangerous condition. Foster claimed that Costco owed him a duty to maintain an estab-

lishment free of dangerous conditions, including exposed pallets throughout the aisles.

Foster's deposition was taken, and Costco then filed a motion for summary judgment, contending that the presence of the pallets was open and obvious and that it was not liable for injuries arising from an open and obvious hazard. According to Costco's summary judgment motion, it is undisputed that Foster was in the paper goods section of the warehouse shopping for, among other things, trash bags, when the incident occurred. Foster testified in his deposition that, as he entered the aisle, he saw approximately three pallets on the right side and two pallets on the left side. Each of the pallets had boxes on them. Foster observed a Costco employee moving boxes from the pallets onto the shelves. There were no barricades placed to warn customers or to prevent them from entering the aisle while the Costco employee was restocking the shelves.

Foster also testified that a slightly turned box was hanging over the edge of the pallet that caused his fall. Foster further stated that he was able to see some of the wood comprising the pallet in question and that he was aware that the subject pallet was obscured by a box. However, Foster claimed that he did not see the corner of the pallet. Foster then testified that he looked at the Costco employee moving the boxes, looked up at the displayed products on the shelves, and when he walked around the employee and the pallet, stepped around the slightly turned box thinking that he had bypassed the pallet. But ''somehow [his] left toe caught on the corner of the pallet,'' and he fell. As a result of the accident, Foster sustained injuries to his left knee, right shoulder, and right-hand ring finger.

In opposing Costco's summary judgment motion, Foster argued that there were material questions of fact as to whether the dangerous condition was obvious, because even though he could see some of the pallet underneath the boxes, he could not see the corner of the pallet due to the way the box was positioned. Foster also asserted that even if the condition was obvious, there were further material questions of fact as to whether Costco was liable in creating or subjecting him to the peril.

The district court granted Costco's motion for summary judgment, finding that the peril created by the pallet was open and obvious to Foster, that the boxes partially concealing the pallet created notice to Foster of the potential hazard, and that Foster's testimony demonstrated his comprehension of the dangerous condition. Citing *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962), the district court concluded that Costco did not breach its duty of care because under the circumstances, it had no duty to warn Foster or to remedy the open and obvious condition. Therefore, the court concluded that Costco's actions were not negligent. This appeal followed.

DISCUSSION

We take this opportunity to examine the development of the open and obvious doctrine and hold that landowners are not free from the duty to exercise reasonable care solely because the danger posed was open and obvious. In doing so, we adopt the approach taken by section 51 of the Restatement (Third) of Torts: Physical and Emotional Harm: a landowner owes a duty of reasonable care to entrants for risks that exist on the property. Thus, the fact that a dangerous condition is open and obvious does not automatically shield a landowner from liability but rather bears on whether the landowner exercised reasonable care with respect to that condition and issues of comparative fault.

Standard of review

[Headnotes 3, 4]

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. *Klasch v. Walgreen Co.*, 127 Nev. 832, 836, 264 P.3d 1155, 1158 (2011). As part of this de novo review, we consider the evidence ''in a light most favorable to the nonmoving party.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper only if no genuine issue of material fact exists ''and the moving party is entitled to judgment as a matter of law.'' *Cervantes v. Health Plan of Nevada*, 127 Nev. 789, 792, 263 P.3d 261, 264 (2011); *see* NRCP 56(c).

[Headnotes 5-8]

To prevail on a traditional negligence theory, a plaintiff must demonstrate that ''(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.'' *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 412, 282 P.3d 727, 732 (2012). Courts often are reluctant to grant summary judgment in negligence actions because whether a defendant was negligent is generally a question of fact for the jury to resolve. *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997). However, summary judgment is proper when the plaintiff cannot recover as a matter of law. *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). To establish entitlement to judgment as a matter of law, Costco must negate at least one of the elements of negligence. *Harrington*, 113 Nev. at 248, 931 P.2d at 1380. Here, Costco asserted that, because the risk posed by the pallet was open and obvious, it owed no duty of care to Foster and, therefore, Foster could not prevail on his negligence claim. Whether Costco owed a duty to Foster is a question of law that this court reviews de novo. *Sanchez v. Wal-*

Mart Stores, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009); *Turner v. Mandalay Sports Entm't*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008).

Development of the open and obvious doctrine

With roots in English and early American common law, and most likely derived from the political power of landowners prior to the twentieth century, the open and obvious doctrine eliminates landowner liability to business visitors resulting from open and obvious dangers. *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 118-19 (2d Cir. 2000) (outlining the transformation of the open and obvious doctrine); *see* Restatement of Torts § 340 (1934) (providing that ''a possessor of land is not subject to liability to his licensees . . . for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein''); James P. End, Comment, *The Open and Obvious Danger Doctrine: Where Does It Belong in Our Comparative Negligence Regime?*, 84 Marq. L. Rev. 445, 457 (2000) (''Landowner sovereignty resulted from the belief that landowners possessed the right to use their land as they so chose.''). ''The rationale of the open and obvious doctrine is that the defendant should not be held liable for harm caused by a danger that was open and obvious to the person suffering the harm.'' Robert A. Sedler, *The Constitution, the Courts and the Common Law*, 53 Wayne L. Rev. 153, 172 (2007). This court adopted this position in the case relied on by the district court, *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962), holding that a landowner '' 'is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.' '' (quoting *Brown v. San Francisco Ball Club*, 222 P.2d 19, 20 (Cal. Ct. App. 1950)).

The open and obvious doctrine was widely criticized by legal scholars and courts as being too harsh, however, and courts began to depart from it in the mid-twentieth century. *See* James Fleming, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 Yale L.J. 605, 628 (1954); Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. Pa. L. Rev. 629, 642-43 (1952); *see, e.g.*, *Hanson v. Town & Country Shopping Center, Inc.*, 144 N.W.2d 870, 874 (Iowa 1966) (''To arbitrarily deny liability for open or obvious defects and apply liability only for hidden defects, traps, or pitfalls, is to adopt a rigid rule based on objective classification in place of the concept of the care of a reasonable and prudent man under the particular circumstances.'').

In 1965, the Restatement (Second) of Torts was published, recognizing this trend and modifying its assessment of the open and

obvious doctrine so that ''[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'' Restatement (Second) of Torts § 343A(1) (1965). As a result, jurisdictions throughout the country have retreated from strict application of the open and obvious doctrine, departing ''from the traditional rule absolving, *ipso facto*, owners and occupiers of land from liability for injuries resulting from known or obvious conditions, and [moving] toward the standard expressed in section 343A(1) of the Restatement (Second) of Torts (1965).'' *Ward v. Kmart Corp.*, 554 N.E.2d 223, 231 (1990) (listing cases from state supreme courts that have adopted the Second Restatement approach); *see Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 390 (Ky. 2010) (''the modern trend, as embodied in the Restatement (Second) of Torts, is the better position''); *but see Jones Food Co., Inc. v. Shipman*, 981 So. 2d 355, 363 (Ala. 2006) (holding that no duty was owed with regard to open and obvious dangers); *Armstrong v. Best Buy Co., Inc.*, 788 N.E.2d 1088, 1091 (Ohio 2003) (same). This court adopted the Restatement (Second)'s position in *Rogers v. Tore, Ltd.*, 85 Nev. 548, 550, 459 P.2d 214, 215 (1969), stating that ''[t]he invitee's knowledge of the danger does not inevitably bar recovery.'' This court has since reaffirmed this position. *See, e.g.*, *Harrington v. Syufy Enters.*, 113 Nev. 246, 250, 931 P.2d 1378, 1381 (1997); *Moody v. Manny's Auto Repair*, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994); *Twardowski v. Westward Ho Motels*, 86 Nev. 784, 787, 476 P.2d 946, 947 (1970).

Under the Second Restatement, a landowner should anticipate, and is liable for failing to remedy, the risk of harm from obvious hazards when an invitee could be distracted from observing or avoiding the dangerous condition, or may forget what he or she has discovered, and the landowner has ''reason to expect that the invitee will nevertheless suffer physical harm.'' Restatement (Second) of Torts § 343A cmt. f (1965). This principle is known as the distraction exception to the open and obvious rule. *Id.*; *see* Kenneth R. Swift, *I Couldn't Watch the Ball Because I Was Watching the Ferris Wheel in Centerfield*, 22 Ent. & Sports Law. Winter 2005, at 1, 34 (noting that comment f has been extensively applied by numerous jurisdictions). For example, a landowner should anticipate that, in certain circumstances, store displays will distract customers and potentially prevent them from discovering and avoiding even conspicuous dangers.

This principle was exemplified in the 2000 Second Circuit Court of Appeals opinion *Michalski v. Home Depot*. In *Michalski*, a customer of a warehouse store was injured when she tripped and fell over a pallet left on a forklift while walking down an aisle in

order to view and purchase bathroom cabinets. 225 F.3d at 115. Like in the case at bar, the district court granted summary judgment in favor of the warehouse store, finding that the pallet was an open and obvious danger. *Id.* at 116. In predicting New York law, the Second Circuit applied the reasoning espoused by the Second Restatement and held that the district court erred in granting summary judgment against the patron because questions of material fact existed as to whether the store was liable, either because the condition was made unreasonably dangerous due to the fact that customers would not anticipate encountering it in that location, or because it was reasonably foreseeable that customers would be distracted by merchandise from observing the pallet near the floor. *Id.* at 121. The court rejected the traditional approach, stating that ''even obvious dangers may create a foreseeable risk of harm and consequently give rise to a duty to protect or warn on the part of the landowner.'' *Id.* at 119; *see Harrington*, 113 Nev. at 250, 931 P.2d at 1381. The *Michalski* court recognized that

> the open and obvious nature of a dangerous condition on its property does not relieve a landowner from a duty of care where harm from an open and obvious hazard is readily foreseeable by the landowner and the landowner has reason to know that the visitor might not expect or be distracted from observing the hazard.

225 F.3d at 121. By relying on the modified rule, the Second Circuit, like courts across the country, including this court, upheld the general duty of reasonable care. *Id.* at 120; *see Billingsley v. Stockmen's Hotel*, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995) (providing that ''[p]roprietors, like all other persons, have an obligation to act reasonably towards other persons''); *Moody v. Manny's Auto Repair*, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994) (maintaining that ''determinations of liability should primarily depend upon whether the owner or occupier of land acted reasonably under the circumstances'').

The general duty of reasonable care is the focus of the newly adopted Restatement (Third) of Torts: Physical and Emotional Harm section 51 (2012):

> [A] land possessor owes a duty of reasonable care to entrants on the land with regard to:
>
> (a) conduct by the land possessor that creates risks to entrants on the land;
>
> (b) artificial conditions on the land that pose risks to entrants on the land;
>
> (c) natural conditions on the land that pose risks to entrants on the land; and
>
> (d) other risks to entrants on the land when any of the affirmative duties . . . is applicable.

The duty espoused in the newest iteration is similar to, and includes, both the general landowner's duty imposed with regard to invitees in the Restatement (Second) of Torts section 343, and the ''distraction exception'' to the open and obvious rule reflected in the Restatement (Second) of Torts section 343A. Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmts. a and k (2012). However, the duty imposed in the Third Restatement is amplified, as it is extended to all entrants on the land (except for flagrant trespassers, *see* Restatement (Third) of Torts: Phys. & Emot. Harm § 52 (2012)), not just invitees. Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. a (2012).[1] Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all entrants, regardless of the open and obvious nature of dangerous conditions. The ''duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm.'' *Coln v. City of Savannah*, 966 S.W.2d 34, 43 (Tenn. 1998), *overruled on other grounds by Cross v. City of Memphis*, 20 S.W.3d 642, 644 (Tenn. 2000); *see* Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. i (2012).

While the open and obvious nature of the conditions does not automatically preclude liability, it instead is part of assessing whether reasonable care was employed. Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. k (2012). In considering whether reasonable care was taken, the fact-finder must also take into account the surrounding circumstances, such as whether nearby displays were distracting and whether the landowner had reason to suspect that the entrant would proceed despite a known or obvious danger. Restatement (Second) of Torts § 343A cmt. f (1965); *see* Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. k (2012) (explaining that a warning ordinarily would be futile when the danger is open and obvious); *Harrington*, 113 Nev. at 250, 931 P.2d at 1381 (stating that ''the obvious danger rule only obviates a duty to warn. It is inapplicable where liability is predicated upon acts other than a failure to provide adequate warning of a dangerous condition.'').[2]

Separate from, but related to, the reasonable care assessment is consideration of the entrant's actions and whether he or she failed

---

[1]This court has already ''abandon[ed] former principles of landowner liability based upon the status of the person injured on the premises, such as whether that person is a trespasser, licensee, or invitee.'' *Moody v. Manny's Auto Repair*, 110 Nev. 320, 331, 871 P.2d 935, 942 (1994).

[2]''Known or obvious dangers pose a reduced risk compared to comparable latent dangers because those exposed can take precautions to protect themselves. Nevertheless, in some circumstances, a residual risk will remain despite the opportunity of entrants to avoid an open and obvious risk.'' Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. k (2012).

to exercise reasonable self-protection in encountering the danger. Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. k (2012). This is another factor to be ''considered in the apportioning of comparative negligence when awarding damages.'' *Michalski*, 225 F.3d at 121; Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. k (2012); *see* Restatement (Second) of Torts § 343A cmt. e (1965); NRS 41.141 (comparative negligence of the plaintiff does not bar recovery if that negligence was not greater than the negligence of the defendant).

[Headnote 9]

Here, the district court relied on *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), but subsequent development of the open and obvious doctrine compels reversal of summary judgment. Costco is not free from liability under Nevada law solely because the danger of the pallet in its aisle may have been open and obvious to Foster. A jury could reasonably believe that Foster walked down the paper goods aisle without observing the corner of the subject pallet because the corner was obscured by a slightly turned box, which blocked it from his sight. Even if a jury finds the risk to be open and obvious, it must also decide whether Costco nevertheless breached its duty of care to Foster by allowing the conditions to exist and by permitting Foster to encounter those existing conditions; if so, the jury must further determine whether Foster was partially at fault under comparative negligence theories. Accordingly, viewing the evidence in the light most favorable to Foster, we conclude that genuine issues of material fact precluded summary judgment, as material facts remain as to whether Costco exercised reasonable care.

CONCLUSION

Under these facts, liability cannot properly be decided as a matter of law, and thus, summary judgment on Foster's negligence claim was inappropriate. Therefore, we reverse the judgment of the district court and remand this matter for further proceedings consistent with this opinion. On remand, Costco's alleged negligence should be determined pursuant to the Third Restatement.

PICKERING and HARDESTY, JJ., concur.